THE OBAMA ADMINISTRATION'S PART 83 REVISIONS AND HOW THEY MAY ALLOW THE INTERIOR DEPARTMENT TO CREATE TRIBES, NOT RECOGNIZE THEM

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN, INSULAR AND ALASKA NATIVE AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

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Wednesday, April 22, 2015

U.S. House of Representatives

Subcommittee on Indian, Insular and Alaska Native Affairs

Committee on Natural Resources

Washington, DC

The subcommittee met, pursuant to notice, at 4:47 p.m., in room 1324, Longworth House Office Building, Hon. Don Young [Chairman of the Subcommittee] presiding.

Present: Representatives Young, Benishek, Gosar, LaMalfa, Cook, Radewagen, Bishop; Ruiz, and Torres.

Also present: Representatives Courtney and Esty.

Mr. YOUNG. The committee will come to order. I do apologize, ladies and gentlemen, for the delays. I have no control over the voting. If I could talk the Speaker to give me that control, we would have a pretty good-run system. But that is not going to happen.

[Laughter.]

Mr. YOUNG. They don't particularly like my opinions about time. We are averaging about 28 minutes per vote now. It is supposed to be 15 and 2. And no one quite understands that.

But again, everybody is here, and I thank you for your patience. I will have an opening statement, and when the Ranking Member gets here, I will—therefore, I ask unanimous consent that all Members with opening statements be made part of the hearing record, if they are submitted to the committee by 5:00 p.m. today.

Before we begin, I would like unanimous consent to allow our colleagues from Connecticut, Congresswoman Elizabeth Esty and Congressman Joe Courtney, to participate in our hearings today.

[No response.]

Mr. YOUNG. Hearing no objection, so ordered. Today the subcommittee will examine—welcome, Doctor.

Dr. RUIZ. Thank you.

Mr. YOUNG. Congratulations, by the way.

Dr. RUIZ. Thank you.

Mr. YOUNG. I have not had a chance to do that. Of course, a picture. He has a new baby girl.

Dr. RUIZ. Two.

Mr. YOUNG. Two? Whoa.

Dr. RUIZ. Girls.

Mr. YOUNG. Doggone it. Never mind, I won't say anything.

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Mr. YOUNG. The subcommittee will examine proposed revisions to a rule that will relax and eliminate key criteria by which the Department determines whether a group is an Indian tribe within the meanings of Federal law. The Department's rule is contained as Part 83 of Title 25 of the Code of Federal Regulations. Accordingly, this is sometimes called the "Part 83 Process," or the "Federal Acknowledgment Process."

Federal recognition is not an act of symbolism. It carries with it a number of unique benefits, rights, and immunities for Indian tribes, including sovereign immunity in state and Federal courts, and a right to conduct gaming. The federalist system in the United States is affected because state jurisdiction is divested when land is acquired in trust for a newly recognized tribe.

The impact of recognition affects Congress. When a new tribe is recognized, Congress must exercise increased appropriations to ensure that our trust responsibilities toward existing tribes, as required by law, are not diminished by the hundreds of tribes currently recognized.

Finally, recognition affects other tribes. This is especially true for treaty tribes whose solemn treaty rights were negotiated with the United States and may be diminished by the recognition of splinter groups.

For these reasons, the highest standards for extending recognition to a single new tribe must be applied, or the integrity and the statute of every recognized tribe will be undermined and diminished. Unfortunately, the proposed rule to Part 83 does not uphold high standards. I think, personally, it guts them. The proposal is fundamentally flawed, if implemented, the rule will lead to the executive branch creation of tribes, not the acknowledgment of tribes as authorized by Congress.

As the Assistant Secretary highlights in his prepared statement, "I have been among those calling for reforms in the recognition process." But contrary to what the Assistant Secretary will testify, I call for reforming the procedures, not relaxing or eliminating the criteria for extending recognition.

Moreover, I have cautioned the Department to review the source of its authority to maintain the Part 83 process. There is some dispute over the source of the Secretary's authority to recognize tribes. One thing is clear: Congress has not established the criteria in the Department's rule.

In a March 26 letter signed by me, Chairman Bishop, and three Democratic colleagues, we advised Secretary Jewell that Part 83 procedures "are not based on standards or guidelines established by Congress, whose power to regulate Indian affairs under Article 1, Section 8 of the Constitution have been characterized by the Supreme Court as plenary and exclusive." The letter further asks the Secretary to refrain from issuing final regulation until this committee has conducted necessary oversight and engaged with the Department's officials to evaluate how to best address the controversial issues associated with recognizing new tribes.

In spite of this respectful request, Mr. Kevin Washburn, the Department forwarded the rule 2 days ago to the Office of Manage-

ment and Budget for a final review. It, frankly, appears that this is a snub to this committee's oversight function, and it is a snub to me, personally, and I do not take that lightly.

[The prepared statement of Mr. Young follows:]

PREPARED STATEMENT OF THE HON. DON YOUNG, CHAIRMAN, SUBCOMMITTEE ON INDIAN, INSULAR, AND ALASKA NATIVE AFFAIRS

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I now recognize the Ranking Member for any statement he may have.

Mr. YOUNG. I now recognize the Ranking Member for any statement he may have.

STATEMENT OF THE HON. RAUL RUIZ, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Dr. RUIZ. Thank you, Mr. Chairman. First, I want to thank Senator Blumenthal for joining us to offer his views. I also want to give a special thanks to Chairman Robert Martin from the

Morongo Band of Mission Indians from the great state of California and the great District 36 for coming here to testify. And I would like to thank all of the other tribal leaders who have come from far and wide to address this topic.

Federal recognition is extremely important and valuable to a tribe's economic and social condition. Recognition entitles tribes to distinctive benefits, including eligibility to participate in many Federal programs, receipt of services from Federal agencies, and sovereign governmental status regarding local jurisdiction and taxation. Most notably, however, Federal recognition enables tribes to petition the Secretary of the Interior to take land into trust for their benefit.

Today we will be discussing the issue where the Federal acknowledgment process is set forth in Part 83 of Title 25 of the Code of Federal Regulations, better known as just "Part 83," and the changes proposed by the Department of the Interior.

Almost from the date of its inception, the Federal acknowledgment process has been plagued with problems. It has been criticized as being too slow, too expensive, inefficient, burdensome, intrusive, less than transparent, and unpredictable. There are many instances of tribes waiting decades to get a determination from the Department of the Interior. This process requires petitioners to dedicate thousands of hours at great expense to provide evidence to satisfy the mandatory criteria. Producing evidence can be an extremely difficult process for a group of people who, sometimes for hundreds of years, have had their sites, artifacts, and documents amassed, and often destroyed by various researchers, collectors, museum developers, et cetera.

At a House hearing in 1994, Bud Shepard, the primary author of the original acknowledgment regulations stated, "I suppose that I would be redundant in saying that the regulations do not work. I think that they have never worked. Even during my tenure in office we realized that there were problems with the regulations."

The House of Representatives has held at least 10 hearings on the Federal acknowledgment process, or legislation to modify the process. And that is what brings us here today. The Administration has finally acted and put forth its proposed changes to the Federal acknowledgment process. This proposal has sparked a fierce debate in Indian Country, both for and against, and has brought to the forefront the issues of tribal sovereignty, history, and identification.

The process must be made more transparent, less cumbersome, and more predictable. But, in doing so, we must not lower the bar on the standards for Federal recognition. As the Administration moves forward with promulgating a final rule, they must not lose sight of the integrity of the process. Our trust responsibility requires that we, as a Nation, do our due diligence when making these determinations. We may not all agree on the specifics, or even on the portions of the proposed rule before us today, but we all agree that it is a flawed system that needs to be addressed, and that this process needs to be fixed so that we can honor our commitments to our native people.

I look forward to the testimony that will be provided today and to a spirited discussion. So, thank you very much, Mr. Chairman, and I yield back my time.

[The prepared statement of Dr. Ruiz follows:]

PREPARED STATEMENT OF THE HON. RAUL RUIZ, RANKING MEMBER, SUBCOMMITTEE ON INDIAN, INSULAR, AND ALASKA NATIVE AFFAIRS

Thank you Mr. Chairman. First, I want to thank Senator Blumenthal (D-CT) for joining us to offer his views. I also want to give a special thanks to Chairman Robert Martin from the Morongo Band of Mission Indians from the great state of California, and the great 36th Congressional District, for coming here to testify. And I would like to thank all of the other tribal leaders who have come from far and wide to address this topic.

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I look forward to the testimony that will be provided today and to a spirited discussion.

Thank you Mr. Chairman, and I yield back.

Mr. YOUNG. I thank the gentleman. It is an honor to introduce a Senator that walked across the aisle to the House side.

[Laughter.]

Mr. YOUNG. Miracles never cease, but Blumenthal—thank you, Senator, for being here. And you are up. And you can take as long as you want, because you are a Senator, and I know how you all get.

[Laughter.]

Mr. YOUNG. I might tap a little after 10 minutes. But, please, Senator, go ahead.

STATEMENT OF THE HON. RICHARD BLUMENTHAL, A UNITED STATES SENATOR FROM THE STATE OF CONNECTICUT

Senator BLUMENTHAL. Thanks, Mr. Chairman. As difficult as the walk was, I am honored to be here today, as I am always honored to come across the aisle to this body, where the people are so ably represented. And especially to be here with two of the best Members of this House, if I may say so, my colleagues, Representatives Courtney and Esty, who have taken a very strong interest, as reflected by their presence here today, in the subject that brings us together. And I want to thank you, Mr. Chairman, and Ranking Member Ruiz for the courtesy and the opportunity to be with you today as you exercise this really critically oversight function in the best tradition of the U.S. Congress.

And I would almost say that the remarks that you have made, Mr. Chairman, summarize very cogently a number of the points that I wish to make today. But I want to thank a number of the leaders of the Native American tribal communities who are with us today. I want to thank some of the representatives of my own state who are here. And I also want to thank Kevin Washburn, a very distinguished member of the executive branch, the Assistant Secretary in the Department of the Interior Bureau of Indian Affairs, and also a leader in the Chickasaw Tribal Nation.

And we are here at a critical turning point, as you remarked, Mr. Chairman. The proposed rules have been submitted to the OIRA, as it is called. It has a time limit for considering these proposed rules. In the meantime, there is continued uncertainty and doubt about what the rules will be. Clearly, the proposed rules that were issued on May 29, 2014—you have referred to them—were unacceptable. Not just unacceptable as a matter of policy, but actually illegal, as contrary to law.

And I have taken a strong interest in these rules over, literally, two decades. As Attorney General of my state of Connecticut, I appeared before congressional bodies, I went to court, I participated in tribal recognition proceedings before agencies of the Department of the Interior. So I have a very strong familiarity and background in this area. And I think that where we can all agree is that the process is broken. The process needs reform. It has been, as Ranking Member Ruiz stated, expensive, inefficient, burdensome, intrusive, non-transparent, inconsistent, and unpredictable. Those are the words that Secretary Washburn uses to describe the present process.

Mr. YOUNG. Stop for a minute. Whoever has those phones on, you know how I feel about that. Shut them off, or get out of the room, one or the other. It is against the House rules, it is impolite, and it is rude.

Senator, you may proceed.

Senator BLUMENTHAL. Thank you, Mr. Chairman. So, the agreement really is, I think, perhaps including everyone in this room, at least myself and, I think, the people who have spoken so far—and I am quoting Secretary Washburn, that we "need to expedite the process, and to upgrade the fairness, consistency, and transparency," which means changing the process, not the rules.

The proposed rules, and the changes they would make, in effect, not only lower the bar, they eviscerate and desecrate the bar, dilute

them to the point of being virtually meaningless. And just as examples, for the first time ever, previously denied petitions could be reopened. The starting date for proving continuous tribal existence would be changed from 1789 to 1934, which, even the Department of the Interior and Congress have rejected as a proposal in the past.

The requirement for external identification as a tribe would be effectively wiped out. State reservations could be used as a proxy, or a substitute for proving tribal existence, even though this approach has been consistently rejected by the Interior board of appeals and the courts in Connecticut cases where we have litigated it. Petitioners could rely on multiple 20-year gaps in evidence. The burden of proof would be relaxed and interested parties would be virtually wiped out of the process, despite the key role that they may have played in previous determinations.

This proposed rule is a disservice to everyone involved in the process. My hope is that there have been substantial revisions in it, as the revised draft has been submitted now to OIRA and the Office of Management and Budget. And I hope that the changes in that proposed rule are sweeping, significant, and far-reaching, so as to preserve the rules that exist now.

I just want to finish on this note, Mr. Chairman, and I appreciate your courtesy in giving me a little bit more time. You know, the simple fact is that if these rules are not significantly changed, we are going to see years of litigation, which will further delay recognition proceedings, add additional uncertainty and doubt to the results and, in fact, undermine the sense of trustworthy and legitimate process that tribal groups deserve, states need, and Members of Congress have an obligation to provide.

And one of the changes in the rule, in fact, eliminates a part of the process that currently expedites decisions, because the rule as originally proposed would delay final decisions on tribal recognition by eliminating the administrative appeal process, and forcing parties to go directly to court. We need to be careful as to what we do to the process, as well as what we may do to the rules. I think that we are potentially on the verge of a disaster, if these rules have not been significantly changed.

But my hope, based on what I have heard, is that the Department of the Interior has listened, has heeded what it has heard in the 3,000 comments submitted by September 30, the deadline for the comments to be given to the Department of the Interior, that the rule of law will be upheld. And I think that is the critical point here. Congress has set the rule of law. It set criteria. And those criteria need to be respected, in part because of our respect for the importance of tribal recognition and the elements of sovereignty that it grants.

I have great respect for the sovereignty of our Native American tribes. And that is why I want the rule of law to be upheld as it applies to this process, so that we do not, in effect, eviscerate the credibility and the trustworthiness of recognition, which those groups already recognized have been given, and that they deserve. The credibility, trustworthiness, and legitimacy of this process can be preserved if these Department of the Interior proposals are

sweepingly and significantly changed before they are issued out of OIRA.

Thank you, Mr. Chairman. I would be happy to answer any questions, but I know you have other testimony, and I really do appreciate this opportunity to testify, and to share with you views that I think are reflective of our entire delegation. We work very closely together, including my colleague in the United States Senate, Senator Chris Murphy, and two of my colleagues who are here today.

[No official prepared statement was submitted by Senator Blumenthal.]

Mr. YOUNG. Thank you, Senator. I appreciate your testimony. I would request one thing from you—I don't have a question of you. Being that you are experienced in this arena, and with the Attorney General and your participation, I hope you take the time to communicate your concerns if this rule comes out the way you don't like it, so we can look at that, and maybe we can figure out a way to rectify some of the mistakes the Department may make.

I don't know, I haven't seen the rule, so I have no knowledge of what is going on, the proposed new one. So, just do that, keep that in mind. We are on the House side, and we will be addressing this issue through this committee, one way or the other. We may be happy, I don't know.

Senator BLUMENTHAL. I would be happy to share our views with you, Mr. Chairman. I can tell you I will be one of the first in line at the courthouse door if I believe that these rules are inconsistent with the statutes. I will be supporting action to strike them down. And I am sure there will be litigation resulting from it, so we won't be shy about expressing our views and the lack of transparency. None of us know what these proposals are that have been submitted to OIRA.

Mr. YOUNG. Thank you.

Senator BLUMENTHAL. And I think that is troubling.

Dr. RUIZ. I just want to say thank you, Senator Blumenthal, and we look forward to working with you and having further discussions about the importance of getting this right.

Mr. YOUNG. With that, you are excused.

Senator BLUMENTHAL. Thank you.

Mr. YOUNG. And welcome, Mr. Chairman. I am glad to see you here. Would you like to sit in the chair? Are you OK?

[Laughter.]

Mr. BISHOP. But I am sitting in a chair.

Mr. YOUNG. Oh, that is true. But it is not as comfortable as this one. OK, thank you, sir.

Senator, thank you.

Senator BLUMENTHAL. Thank you very much, Mr. Chairman, and Mr. Chairman.

Mr. YOUNG. Now we have the panel coming forth, Kevin Washburn, Assistant Secretary, Indian Affairs, Department of the Interior; Brian Cladoosby, President, National Congress of American Indians, Embassy of Tribal Nations; Chairman Robert Martin, Morongo Band of Mission Indians, Banning, California—that is in your district?

Dr. RUIZ. Yes.

Mr. YOUNG. Oh, OK. I should have let you introduce him, I am sorry.

Mr. Glen Gobin, Vice Chairman and Business Committee Chair, Tulalip Tribes, Tulalip, Washington; The Honorable Fawn Sharp, President of the Quinault Indian Nation, Taholah, Washington; and Mr. Don Mitchell, Attorney at Law, Anchorage, Alaska.

And I remind all of you, you have 5 minutes. And I may extend it to some degree.

I would suggest one thing to the members of the committee, if possible. Mr. Mitchell has written a very, I would say, telling memo on this. And if he will issue that to you, if it is not in the testimony, read it, because his testimony is too long. That is what I am saying this for. So we have to figure that out.

But, anyway, Kevin, you are up, Mr. Secretary.

STATEMENT OF KEVIN K. WASHBURN, ASSISTANT SECRETARY, INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, DC

Mr. WASHBURN. Chairman, thank you so much, Ranking Member. And I would also be willing to offer my chair to Chairman Bishop, too, although I don't know if it would be as comfortable.

[Laughter.]

Mr. WASHBURN. Chairman, this is very important work. We have a trust responsibility to Indian tribes. And if there is a legitimate tribe out there who we have not recognized, then that is an injustice. And that is why we do this work, because we have a trust responsibility to tribes.

It is very difficult work. We have a diligent staff of experts, historians, and ethnologists, anthropologists and genealogists, that is, who use careful procedure, and they use peer review. These are people who, if they weren't doing this work, they would be teaching at universities or doing research at the Library of Congress or something like that. It is very hard work, and sometimes very rewarding, although sometimes they deliver bad news.

In fact, in the history of this process, 34 groups have been denied recognition, and only 17 have been recognized. During the time of this group's work, the Office of Federal Acknowledgment, Congress itself has recognized far more tribes than the Department has through this process.

We talked about some of the adjectives to apply to the process, that it is too slow, that it is too expensive, inefficient, burdensome, and so on. And we have heard that many times before. In part, that is a reflection of the rigor of the process. It is a very rigorous process, and it should be a rigorous process, because legitimacy and integrity is exceedingly important here. We don't want anybody to get through the process that is not a legitimate tribe, because, you know, the trust responsibility is at stake.

And our goal with this process is to maintain that integrity and that rigor, but also address these other issues that Senator Blumenthal has raised in the past, and, Chairman, you have raised in the past, and so many others have raised in the past. And this is definitely evidence that no good deed goes unpunished, because we have been yelled at for 20 years about how this process is broken, and we have taken a real effort to try to fix it.

We have used a process that is—well, we have used more process than we have in virtually any other rulemaking we have ever done, including 11 meetings with tribes and with the public around the country over the course of two different drafts.

In our first draft, our discussion draft that we put out just to start the discussion, we put a lot of ideas in there. And, frankly, we have backed off of some of those ideas. Our proposed rule was more conservative than what we originally put out in the discussion draft. And no one here has seen it, so, you know, I am the only one who has. But our final rule will be yet again more conservative than what we put out in the proposed rule, because we have been listening. We have gotten lots of comments, and we have been listening to those comments, and we are reacting accordingly.

We do believe that we have found a way to improve transparency, timeliness, and efficiency. In some respects, that will produce quicker rejections, quicker disapprovals of these groups, and that will be a good thing, too, because those people can get on with their lives. But it is important to us to maintain the legitimacy and the rigor of the process at all costs. And we do intend to do that. And we have heard loud and clear the concerns about changing the criteria, and we are endeavoring to make sure that we listen to the comments that we have heard.

I think I can probably stop there and yield back a minute-and-a-half for the other witnesses. Thank you.

[The prepared statement of Mr. Washburn follows:]

PREPARED STATEMENT OF KEVIN K. WASHBURN, ASSISTANT SECRETARY—INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

"I think we can all agree that reforms to expedite the process and to upgrade fairness, consistency, and transparency are warranted."

Congressman Don Young (R-AK), H. Hrg. No. 110–47 (10/03/07).

Good afternoon Chairman Young, Ranking Member Ruiz, and members of the subcommittee. My name is Kevin Washburn, and I am a member of the Chickasaw Nation of Oklahoma, and currently serve as the Assistant Secretary—Indian Affairs at the Department of the Interior (Department). Thank you for the opportunity to provide an overview of the Department's efforts to improve the Department's Federal acknowledgment process. We are endeavoring to provide reforms to accomplish the goals that Chairman Young has identified in the Department's Federal acknowledgement process.

As the committee is well aware, Congress possesses the plenary power and authority to grant (or terminate) the Federal recognition of Indian tribes. The work of Congress in this area is legitimate and important. Notwithstanding the plenary power of Congress in tribal recognition, the Department also plays a role in this area. Because the Department must provide programs and services to eligible Indian tribes in implementing its responsibilities under Federal law, the Department must routinely decide whether to acknowledge a group as an Indian tribe. As a practical matter, Congress and the executive branch have proceeded on simultaneous tracks to consider acknowledgement of Indian tribes.

When the Department, rather than Congress, acts to acknowledge a petitioning group as an Indian tribe, it is imperative that the Department's work is trustworthy and that the ensuing decisions are perceived by the public as legitimate. The Department's administrative process for acknowledging a petitioner as an Indian tribe is set forth at Part 83 of Title 25 of the Code of Federal Regulations (Part 83 Process), "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." These regulations, first promulgated in 1978, provide a formal and rigorous process for establishing that an Indian group exists as an Indian tribe.

Since 1978, the Department has recognized 17 tribes and denied 34 groups through the Part 83 Process. The Indian tribes most recently recognized by Congress are the Federated Indians of Graton Rancheria and the Shawnee Tribe, both in 2000. The Indian tribes acknowledged most recently through the Part 83

Process are the Mashpee Wampanoag Tribe in 2007 and the Shinnecock Indian Nation in 2010.

Over the course of resolving more than 50 petitions for Federal acknowledgment, the Part 83 Process has been controversial and frequently criticized. The good work and leadership of previous subcommittees and predecessor Natural Resources Committees produced a voluminous record of both perceived shortcomings of the Part 83 Process and potential solutions. In Congressional hearings, members of this chamber have repeatedly explained for the past two decades that the process is broken and in need of reform. These concerns have been identified on both sides of the aisle and in both chambers of Congress. Well over 15 years ago, Chairman Don Young described the process as "slow, cumbersome, and enormously expensive[.]"[1] Congressman Tom Cole has made similar statements, explaining that the process is controversial, complex, bureaucratic, and "has not worked well."[2] Congressman Eni Faleomavaega said that the process "needs reform" and described it as "cumbersome."[3] Congressman Dale Kildee also said that the "process is broken" and also expressed concern about the time it takes for decisions.[4]

Similar assertions have come from members of the other chamber, including, for example: Senate Indian Affairs Chairman John Barrasso (urging progress in fixing the acknowledgement system),[5] Senate Indian Affairs Ranking Member Jon Tester ("the process is broken"),[6] Senate Indian Affairs former Ranking Member Lisa Murkowski ("the process is one that just does not work"),[7] then Senate Indian Affairs Chairman Byron Dorgan ("it is quite clear the process for acknowledgment is broken."),[8] Senator Tom Udall (discussing "the pitfalls and the long and complicated and even unclear process of Federal acknowledgement"),[9] and Senator Bill Nelson (describing "a process that needs to be repaired and that needs to be improved").[10] The work of House and Senate leaders on legislation and oversight hearings over the years has been enormously helpful in charting a path forward.

To summarize all of the many comments we have heard over the years from Members of Congress, the process is slow, expensive, inefficient, burdensome, intrusive, non-transparent, inconsistent, and unpredictable.

Of course, we have heard similar concerns expressed by the National Congress of American Indians, which has wide representation across Indian country, as well as numerous individual Indian tribes, petitioning groups, states and local governments, and other members of the public. Because of these criticisms, the Department believed that it was sensible to develop a reform initiative. The Department has taken the criticisms to heart as it has considered steps toward reform.

I began working on this issue almost as soon as I undertook my position as Assistant Secretary. In March of 2013, I shared with this committee the progress the Department had made to identify guiding principles of improvement: transparency, timeliness, efficiency, and flexibility. We also shared our path forward—issuance of a discussion draft of potential changes in the spring of 2013, consultation and public input on the discussion draft, preparation of a proposed rule, followed by another round of consultation and public input on the proposed rule.

Our efforts to obtain tribal and public input have been more robust than our process for any other rulemaking in the last 6 years. We have held 22 meetings (11 tribal consultations and 11 public meetings) and 4 nationwide teleconferences. Over the past 2 years, we have received thousands of comments on this regulatory initiative, including comments from states and local governments, federally recognized Indian tribes, inter-tribal organizations, non-federally recognized tribes, and members of the public. While this extensive public process has required us to move more slowly than we would have liked (and thus prevented us from issuing a final rule in 2014 as I had optimistically forecast), our goal is to issue a final rule this year.

BACKGROUND OF THE CURRENT FEDERAL ACKNOWLEDGMENT PROCESS

The day-to-day work of implementing the Part 83 Process regulations is performed by the Office of Federal Acknowledgment (OFA), which is located within the Office of the Assistant Secretary—Indian Affairs. OFA makes acknowledgment rec-

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[1] Cong. Rec. H9459 (10/05/98).
[2] H. Hrg. No. 110–47 (10/03/07).
[3] H. Hrg. No. 110–47 (10/03/07).
[4] H. Hrg. No. 110–47 (10/03/07).
[5] S. Hrg. 112–684 (7/12/12).
[6] S. Hrg. 111–470 (11/4/09).
[7] S. Hrg. 111–470 (11/4/09).
[8] S. Hrg. 110–686 (9/25/08).
[9] S. Hrg. 111–470 (11/4/09).
[10] S. Hrg. 111–470 (11/4/09).

ommendations to the Assistant Secretary. OFA is currently staffed with a Director and a professional staff consisting of four anthropologists, four genealogists, four historians, and an administrative assistant. Generally, a team composed of one professional from each of these three disciplines is constructed to review each petition. It is difficult, detail-oriented work performed by experts.

The Part 83 Process regulations set forth seven mandatory criteria that a petitioner must satisfy. The Department considers a criterion satisfied if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion is not required and the Department does not apply a "preponderance of the evidence" standard to each criterion.

Although these criteria have remained largely unchanged since 1978, the Department in 1994 changed the criterion of external identification as an American Indian entity to require that it be demonstrated since 1900 rather than first sustained contact to avoid problems with historical records in earlier periods while retaining the requirement for substantially continuous identification as an American Indian entity. The Department also added a section relating to previous Federal acknowledgment for those petitioners that had evidence such as treaty relations with the United States or treatment by the Federal Government as having collective rights in tribal lands or funds.

PRINCIPLES GUIDING IMPROVEMENTS IN THE FEDERAL ACKNOWLEDGMENT PROCESS

Following years of criticism described, in part, above, the Department began an intensive internal review of the Part 83 Process regulations at the beginning of the Obama administration in 2009, including obtaining input from the Office of the Assistant Secretary—Indian Affairs, OFA, and the Office of the Solicitor. From our review, it is clear that much of the time and expense of the Part 83 Process flows directly from an ever-increasing documentary burden and the lack of clarity of the process. We accepted the criticism in good faith and sought ways to address the criticism. By 2012, the Department developed consensus that improvements to Part 83 Process must address certain guiding principles:

- **Transparency**—ensuring that standards are objective, consistent and that the process is open and is easily understood by petitioning groups and interested parties.
- **Timeliness**—moving petitions through the process, responding to requests for information, and reaching decisions as soon as possible, while ensuring that the appropriate level of review has been conducted.
- **Efficiency**—conducting our review of petitions to maximize results from expended Federal resources and to be mindful of the resources available to petitioning groups.
- **Flexibility**—understanding the unique history of each tribal community, and avoiding the rigid application of standards that do not account for the unique histories of tribal communities.

Once the Department identified the principles for reform, we created an internal workgroup to develop options to improve the Part 83 Process under these guiding principles. As a result of extensive meetings of this core workgroup, the Department released a discussion draft on June 21, 2013, and announced public meetings and tribal consultation sessions. Throughout July and August 2013, the Department hosted tribal consultation sessions for representatives of federally recognized Indian tribes and separate public hearing sessions for interested individuals or entities at five locations across the country.

During these sessions, serious efforts were undertaken to capture meaningful comments on our discussion draft and other suggestions for reform. A professional court reporter transcribed each session. The Department made the transcripts available on its Web site and posted each written comment it received also on its Web site. At the request of states, Indian tribes, and others, the original comment deadline of August 16, 2013, was extended to September 30, 2013, to allow additional time to provide input. Tribal and public engagement at this stage of the reform initiative was incredibly robust. Commenters submitted more than 200 unique written comment submissions but, in total, more than 4,000 commenters provided input through form letters and signed petitions.

When the comment period on the discussion draft closed, the Department's internal workgroup began reviewing each written and oral comment on the discussion draft. During this review process, which also involved regular team meetings, it began to formulate a draft proposed rule. Prior to publication, the draft proposed rule was reviewed by OMB and Federal agencies.

On May 29, 2014, the Department published the proposed rule in the Federal Register. The publication also announced that the Department would be hosting additional tribal consultation sessions and public meetings at six locations across the country in July 2014. In response to requests for extension, the Department extended the original comment deadline of August 1, 2014, to September 30, 2014. In response to requests for additional meetings at additional locations, the Department announced the addition of two more tribal consultation sessions and two more public hearings to be held by teleconference in August and early September of 2014. The Department again made transcripts of all sessions available on its Web site and made all written comments available on www.regulations.gov. Tribal and public engagement was again robust. Commenters provided more than 300 unique comment submissions on the proposed rule, and more than 3,000 commenters provided input through signatures on form letters or petitions.

Since September 30, 2014, when the comment period on the proposed rule closed, the Department's internal workgroup has been reviewing the comments and drafting a final rule. The internal workgroup has included representatives of the Office of the Assistant Secretary—Indian Affairs, OFA, the Office of the Solicitor, the Office of Hearings and Appeals, and the U.S. Department of Justice. The comments provided have been extraordinarily helpful to the Department as it moves forward drafting a final rule. Just as the proposed rule was the product of extensive comments on the discussion draft, we anticipate that the final rule will reflect additional changes following comments on the proposed rule. As I previously testified, the work of this committee and the Senate Committee on Indian Affairs in previous Congresses has been extraordinarily helpful to inform our thinking as we move forward with a final rule.

CONCLUSION

I would like to thank you for the opportunity to provide my statement on the process of updating the Federal acknowledgment regulations. I will be happy to answer any questions the subcommittee may have.

Mr. YOUNG. Thank you, Kevin. I appreciate that. Your words sound good, and I hope we are able to look at this later on and say everything is hunky-dory. But that is why we are having the oversight.

Ms. Fawn Sharp, I understand you have another very important engagement down at the Hawk and Dove, and——

[Laughter.]

Mr. YOUNG. Can I join you?

Ms. SHARP. Absolutely.

Mr. YOUNG. I am going to recognize you, and not disrespect the other panel, but because you do have a previous engagement, I will let you go next.

Ms. SHARP. Yes, I appreciate that. Thank you very much.

STATEMENT OF FAWN SHARP, PRESIDENT, QUINAULT INDIAN NATION, TAHOLAH, WASHINGTON

Ms. SHARP. Chairman Young, Ranking Member Ruiz, and members of the subcommittee, my name is Fawn Sharp, President of the Quinault Indian Nation, and I truly appreciate and am honored for this opportunity to testify.

I am not here today to oppose or challenge the right of any group to seek a political relationship with the United States. Instead, I am here to defend the sovereignty of the Quinault Nation, and our exclusive authority to govern our lands, territories, and people.

For more than a century, the Quinault Nation has been under attack from descendants of the Chinook peoples. We have had all branches of government—we have been faced with these various attacks in the court, in the Congress, and through the administra-

tive process. The solemn promises that we have with the United States are detailed in the Treaty of Olympia. That treaty provides an extensive number of issues for which the United States recognizes our exclusive authority over our people and territory.

We are forced to spend considerable time and resources at great expense to defend against these repeated assaults on our tribal sovereignty. The Federal courts and the Administration have consistently found that the Quinault Nation has the exclusive authority to govern our reservation, and to regulate the exercise of treaty rights under the Treaty of Olympia.

The BIA's proposed revisions to the Federal acknowledgment process hold the potential to reopen these settled decisions, which will force us, once again, to re-litigate and defend our treaty and sovereignty rights. For the past 47 years, the BIA has used the Federal acknowledgment process to restore or reaffirm a government relationship with tribes through an administrative process.

The stated purpose is to streamline the process, to increase transparency, efficiency, and consistency. However, several of the proposed revisions undercut these goals by reopening petitions that had been finalized after decades of litigation, and by fundamentally changing the mandatory criteria for acknowledgment that could adversely affect existing tribes, such as Quinault.

Today I will focus on two provisions: the provision authorizing repetitions for groups previously denied acknowledgment; and the provision that presumes the community and political authority criteria on—showing that the U.S. held lands for ancestors of the petitioner at any point.

First, the Quinault Nation strongly opposes the proposal that would allow previously denied groups the opportunity to repetition. This provision would only serve to lengthen and undermine the Federal acknowledgment process, prevent interested parties from voicing concerns, and it will reopen final decisions that have been relied upon by existing tribes.

Department officials have stated that the purpose for reforming the regulations was not to hit the reset button. However, this provision does exactly that. It permits groups to hit the reset button, while ignoring the vested interests of existing tribes.

Considerations of efficiency and finality, and the fundamental legal principle of res judicata support maintaining the existing prohibition against re-application by groups previously denied.

Second, the Quinault Nation opposes the revision to permit a showing that the U.S. held land for the petitioner as conclusive evidence to meet the distinct community and political authority criteria. In 2002, the Interior Department rejected similar factors as meeting the mandatory criteria in the petition submitted by the Chinook descendants. The Department based its reconsidered final determination on more than a century of court decisions, and the findings of historical and legal experts.

The BIA's proposed revisions hold great potential to overturn these decisions, and force the Quinault Nation to once again relitigate these attacks on our sovereignty. As a result, we strongly oppose adding the factor that the United States has held land for the petitioners as dispositive evidence.

In closing, I want to make it clear that the Quinault Nation has a great deal of respect for the Chinook Indian people. However, the issues we raise today relate to the longstanding and unique obligations that the United States owes to the Quinault Nation. Our Nation's inherent interests emanate from that relationship, and are outlined in the treaty with the United States. We have invested nearly a century in defending our treaty rights and sovereignty from legal, administrative, and legislative challenges. Under no circumstances should the Administration authorize a process that would force us to re-litigate these past settled decisions. The Quinault Nation simply cannot support the revisions, as they hold the potential to reopen our treaty and sovereign rights.

In addition, the revisions fail to uphold and establish the safeguards to protect the Federal Government's treaty and trust obligation to the Quinault Nation.

In sum, the proposed revisions, while well-intended, are flawed and misguided.

I again want to thank the subcommittee for this opportunity to testify, and I am prepared to answer any questions that you may have. Thank you.

[The prepared statement of Ms. Sharp follows:]

PREPARED STATEMENT OF FAWN R. SHARP, PRESIDENT, QUINAULT INDIAN NATION

Chairman Young, Ranking Member Ruiz, and members of the subcommittee, I am Fawn R. Sharp, President of the Quinault Business Committee, the elected governing body of the Quinault Indian Nation ("Quinault" or "Nation"). On behalf of the Nation, I thank you for the opportunity to testify about the Bureau of Indian Affairs' ("BIA") proposed revisions to 25 C.F.R. Part 83, the Federal Acknowledgment Process ("FAP").

BACKGROUND/HISTORY OF THE QUINAULT INDIAN NATION

Located in the northwest corner of the United States, the Quinault Nation was one of the last Native nations in the United States to be contacted by the European nations. Less than 1 year before the foundation of the United States, the first recorded contact between the Quinaults and non-Indians occurred on July 13, 1775, when the Spanish vessel *Sonora* anchored several miles from the mouth of the Quinault River. Not long after first contact, our Nation was sadly subjected to the same greed for our homelands and natural resources that tribes across the continent faced.

Upon its formation, the United States acknowledged the existing inherent sovereign authority of Indian tribes over their lands. The Federal Government entered into hundreds of treaties with Native nations to secure peace and trade agreements, to foster alliances, and to build a land base for the newly formed United States. Through these treaties, tribes ceded hundreds of millions of acres of our homelands. In return, the United States promised to provide for the education, health, public safety, and general welfare of Indian people. For the Quinault and other tribes, the United States also promised to preserve our rights to fish and hunt our aboriginal homelands and accustomed areas.

The solemn promises that the United States made to the Quinault Nation were detailed in the Treaty of Olympia, signed on July 1, 1855 and on January 25, 1856 (11 Stat. 971). The Treaty acknowledged Quinault's status as a sovereign Nation with inherent rights to govern our lands, our resources, and our people. This includes access to our usual and accustomed lands and waters and the right to co-manage the natural resources outside of our Reservation borders. The United States has unique legal treaty and trust responsibilities to keep these promises to the Quinault Indian Nation.

The inherent self-governing authority of all Indian tribes is recognized in the U.S. Constitution. The Commerce Clause provides that "Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Tribal citizens are referred to in the Apportionment Clause ("Indians not taxed") and excluded from enumeration for congressional representa-

tion. The 14th Amendment repeats the original reference to "Indians not taxed." These provisions acknowledge that Native Americans were citizens of and subject to the authority of their tribal governments and not citizens of the United States. Finally, the Constitution acknowledges that Indian treaties and the promises made therein are the supreme law of the land. By its very text, the Constitution establishes the framework for the Federal government-to-government relationship with Indian tribes.

Over the past two centuries, the Federal Government has consistently violated these solemn obligations. In the late 1800s the Federal policy of forced Assimilation authorized the taking of Indian children from their homes. Many of our ancestors were sent to boarding schools where they were forbidden from speaking their language or practicing their religion. The officially sanctioned philosophy was to "kill the Indian, save the man." The concurrent policy of Allotment sought to destroy tribal governing structures, sold off treaty-protected Native homelands, and devastated our economies.

Under the authority of the Allotment policy and subsequent related laws, the Federal Government destroyed thousands of acres of Quinault Cedar forests making our homelands virtually unrecoverable. The aftermath of these policies continues to plague the Quinault Nation to this day.

THE FEDERAL ACKNOWLEDGMENT PROCESS

Like the power to recognize foreign governments, the United States has the authority to determine which groups will be recognized as Indian tribes for governmental and political purposes. The Federal Government can establish this relationship in one of three ways: through the Federal courts, through an Act of Congress, and through the Federal acknowledgment process ("FAP"), 25 C.F.R. Part 83 (Prior to 1871, treaties were often used to establish these political relationships).

The BIA promulgated the FAP in 1978 to establish standards for tribes not otherwise acknowledged that respect the great significance of a decision by the United States to enter into a political relationship with an Indian tribe. The stated purpose of the FAP "is to establish a departmental procedure and policy for acknowledging that certain American Indian groups exist as tribes, [which affords] the protection, services, and benefits of the Federal Government.. . . Acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes.. . ." 25 C.F.R. Part 83.2. The current FAP "is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present." 25 C.F.R. 83.3.

The importance of these regulations and the process cannot be overstated. The Federal administrative process to reaffirm or restore the political relationship between a tribe and the United States impacts not only the newly acknowledged tribe but can also impact existing federally recognized tribes. The newly acknowledged tribe will have sovereign authority to establish a land base, exercise civil and criminal jurisdiction over those lands, and will have a formal government-to-government relationship with the United States. Conversely, that same decision may have impacts on existing tribal governments, their rights, and their unique relationship with the United States. Of great importance to the Quinault Nation, the Department's decisions may have the potential to adversely impact our treaty rights and the ability to govern actions on our Reservation.

THE PROPOSED REVISIONS TO THE FAP: 79 FEDERAL REGISTER 30766–81 (MAY 29, 2014)

The stated purpose of BIA's FAP revisions is to streamline the process to increase transparency, consistency, and efficiency. Quinault supports these goals. While some of the proposed revisions foster these goals, several of the proposed revisions undercut these goals by re-opening petitions that have been finalized after decades of debate and by fundamentally changing the mandatory criteria for Federal acknowledgment that could adversely impact existing tribal governments.

The following comments and concerns with the proposed revisions to the FAP are best considered against the long held positions of the Quinault Indian Nation in response to attacks on our treaty rights and the authority to govern the Quinault Reservation that have been repeatedly lodged by descendants of the Chinook.

Individuals claiming Chinook descendancy have made claims in the U.S. Courts and before Congress while attacking the Quinault Nation's status as the federally recognized governing entity of the Quinault Indian Reservation. In 1988, Chinook and Cowlitz testified before Congress against the return of North Boundary lands

to the Quinault Nation. The two groups claimed that the Federal Government has improperly recognized the Quinault Nation as the tribal government over the Reservation and that eight tribes, including the Chinook have equal rights to share in the governance of the Reservation. In 1989, Chinook and other tribal groups filed suit in the U.S. District Court requesting that the Secretary of Interior be required to organize a new tribal organization to govern the Quinault Indian Reservation. The groups claimed to have equal rights with the Quinault Nation to govern the Quinault Indian Reservation.

The Quinault Nation has consistently maintained that Chinook descendants do not satisfy Federal standards for recognition of the Chinooks as an independent tribe. The Interior Department concluded that the Chinook descendants have not existed as a separate social and political community before 1990. Over a hundred years of legal disputes have consistently found that the Chinook descendants have lacked a separate identity. Instead, in 1906, the Court of Claims found that the Chinook had long ago ceased to exist as a tribe. In 1928, the U.S. District Court, in the *Halbert* case found that there was no Chinook tribal organization. Even as the Federal Government provided for allotments on the Quinault Indian Reservation, those were based on Chinook descent, and not as a member of an existing Chinook tribal body. The BIA's experts recommended against Chinook recognition based on the extensive records.

The Quinault Nation has been forced to expend considerable resources to defend itself against such repeated assaults on its sovereignty. These are just a couple of examples of the ongoing issues that demonstrate the historic disputes the Chinooks have with the Quinault Indian Nation. The Quinault Nation spent nearly a century defending our treaty and self-governing rights against these attacks. Federal courts and administrative decisions have repeatedly upheld the exercise of Quinault treaty rights against claims of the Chinook. These decisions have found that only the Quinault Indian Nation has authority to govern the Quinault Reservation and to regulate the exercise of treaty rights reserved to the Quinault under the Treaty of Olympia.

The BIA's proposed revisions to the FAP regulations hold the potential to re-open these settled decisions and could force the Quinault Nation to re-litigate and again defend our solemn treaty rights and inherent sovereign authority to govern our homelands.

Previously Denied Applicants May Re-Petition

Proposed rule § 83.4(b) authorizes a group previously denied acknowledgment under Part 83 to re-petition for Federal acknowledgment under the revised rules once finalized. A petitioner may re-petition only if "*[a]ny* third parties that participated as a party in an administrative reconsideration or Federal Court appeal concerning the petitioner has consented in writing to the re-petitioning." In addition, requests to be allowed to re-petition are to be reviewed by the Department's Office of Hearings and Appeals, and decided on the basis of preponderance of evidence that changes in the regulations would produce a different result or there was a misapplication of the "reasonable likelihood" standard of proof.

The proposal to authorize re-petitioning is unsound for a number of reasons. It will only serve to lengthen and undermine the Federal acknowledgment process, prevent interested parties from voicing concerns with applications to re-petition under the revised rules, and will re-open final decisions that have been relied upon by such interested parties.

For example, despite the fact that previously denied petitions may have had multiple opposing parties, the language in proposed § 83.4(b) indicates that only one prior opposing third party would be required to consent, even if the others objected.

The Department has repeatedly stated that the purposes of the proposed revisions are to increase efficiency, clarity, and transparency while maintaining the same requirements as the present regulations. However, § 83.4(b) clearly anticipates that the changes in the regulations will result in the acknowledgment of previously rejected petitioners. (*See* Proposed 83(b)(I)(ii)(A): "The petitioner proves, by a preponderance of the evidence, that a change from the previous version of the regulations to the current version of the regulations warrants reconsideration of the final determination."). As discussed in detail below, the proposed rule makes major changes to the acknowledgment process and criteria that would result in the acknowledgment of groups that do not meet the existing criteria for acknowledgment.

The Clinton administration considered and rejected a similar proposal to authorize groups to re-petition under the 1994 revisions to the FAP. That administration reasoned, "there should be an eventual end to the present administrative process. Those petitioners who were denied went through several stages of review with multiple opportunities to develop and submit evidence. Allowing such groups to return

to the process with new evidence would burden the process for the numerous remaining petitioners. The changes in the regulations are not so fundamental that they can be expected to result in different outcomes for cases previously denied." Federal Register Doc. No: 94–3934 (page unknown) (Feb. 25, 1994) (http://www.gpo.gov/fdsys/pkg/FR-1994-02-25/html/94-3934.htm).

With regard to the current proposed revisions, Department officials have stated publicly that the purpose for reforming the regulations "was not to hit the reset button" for tribes that have already gone through the process. The Department has acknowledged that when third parties invest time and resources into a process they develop equity in the outcome. As a result, those outcomes cannot be ignored. However, as noted above, under the proposed re-petitioning provision as written, opposition from third parties to a re-petition can be circumvented by gaining consent from another third party.

Finally, Department officials have also publicly acknowledged that constitutional questions remain with regard to the third-party consent provisions included in the re-petitioning process. If the third party veto is found unconstitutional, it could result in striking the consent provisions while permitting previously denied petitioners to re-petition under the relaxed revised rules.

The Quinault Indian Nation strongly opposes the proposed changes to Part 83 that would allow previously denied groups the opportunity to re-petition under the revised FAP rules. As noted above, the Quinault Nation has defended our treaty rights and rights to govern our Reservation against attacks from descendants of the Chinook for decades. Quinault invested significant time and resources to successfully defend these rights. Considerations of efficiency and finality and the fundamental legal principle of *res judicata* support maintaining the existing prohibition against reapplication by groups previously denied. The Nation urges the Department to retain the current policy prohibiting groups from re-petitioning and eliminating the provisions related to re-petitioning from any final rule.

Revised Standards for "Community" and "Political Authority"

The proposed rule would substantially revise standards for determining whether a petitioning group meets the mandatory criteria for "community" and "political authority". The proposed revisions also permit additional forms of evidence to meet criteria (b) and (c), which make the demonstration of these criteria no stronger than that of a social club that holds elections by its membership. Together, these proposed revisions would fundamentally change these criteria to the point that it could adversely impact existing tribal governments and the Department's treaty and trust obligations to all of Indian Country.

The "mandatory criteria" under the current FAP regulations require a petitioner to show: (b) that a "predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"; and (c) that it has "maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. Part 83.7(b), (c).

The current rule defines *community* to mean "any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers. Community must be understood in the context of the history, geography, culture and social organization of the group." Part 83.1. It also defines the term "historical" to mean "dating from first sustained contact with non-Indians." *Id.*

The proposed rule would replace the "historical times" requirements of both (b) and (c), and establish "1934" as the new starting date for proving that a group meets the community and political authority criteria.

In the rulemaking for the only previous revisions to the 1978 FAP, the Clinton administration rejected a proposal to change the starting point for meeting the "distinct community" criterion from "historical times to the present" to "1934".

> "The purpose of the acknowledgment process is to acknowledge that a government-to-government relationship exists between the United States and tribes which have existed since first contact with non-Indians.
>
> Acknowledgment as a historic tribe requires a demonstration of continuous tribal existence. A demonstration of tribal existence only since 1934 would provide no basis to assume continuous existence before that time. Further, the studies of unrecognized groups made by the Government in the 1930s were often quite limited and inaccurate.

> Groups known now to have existed as tribes then, were portrayed as not maintaining communities or political leadership, or had their Indian ancestry questioned. Thus, as a practical matter, 1934 would not be a useful starting point."

Federal Register Doc. No: 94–3934 (page unknown) (Feb. 25, 1994) (http://www.gpo.gov/fdsys/pkg/FR-1994-02-25/html/94-3934.htm).

Of vital importance to the Quinault Nation, the proposed revised standards for recognition have the potential to undermine the Nation's Treaty rights affirmed in *U.S. v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981) ("Washington II", a successor case to the historic Boldt decision). The Ninth Circuit in *U.S. v. Washington*, rejected the argument that "because their ancestors belonged to treaty tribes, the appellants benefited from a presumption of continuing existence." The court further defined as a single, necessary and sufficient condition for the exercise of treaty rights, that tribes must have functioned since treaty times as "continuous separate and distinct Indian cultural or political communities." *Washington II*, 641 F.2d at 1374.

The simple demonstration of ancestry is not sufficient for the exercise of treaty rights, and it should not be sufficient to meet the mandatory criteria for Federal recognition.

Acknowledging groups that have failed to continuously maintain a community or exercise political control over its membership as federally recognized Indian tribes, devalues and undermine the status of all Indian tribes as sovereign political entities with significant governmental authority. These proposed changes hold the potential to redefine tribes as racial, rather than political entities.

Holding Lands "at any point in time from 1934 to the present"

A major proposed revision to the mandatory criteria is listed in proposed Parts 83.11(b)(3)(ii) and (c)(3)(ii). If adopted, these proposals would conclusively determine that a showing that "the United States has held land for the petitioner or collective ancestors at any point in time from 1934 to the present" is evidence to meet the "distinct community" and "political authority" criteria. *See* Proposed Parts § 83.11(b)(3)(ii) and (c)(3)(ii).

Proposed Parts § 83.11(b)(3)(ii) and (c)(3)(ii) fail to adequately explain how "held land for the petitioner or collective ancestors at any point in time from 1934 to the present" equates to a petitioner showing that it existed as a distinct community that has maintained political influence or authority without substantial interruption. These proposed revisions fail to include any qualifications for the term "held land" or a description of the basis for acquiring and holding such land, and thus are far too broad. Without more, this provision does not require the petitioner to show evidence of tribal existence or even implied Federal recognition. Where land was clearly purchased based on tribal existence and recognized status, this would equate with previous Federal recognition, and should be included as evidence for that point in time, but not as evidence for continued tribal existence after that point in time. The fact that the United States "held land" for a group of individuals does not mean that coordinated activities are occurring on the land or that there is a distinct government established to maintain the land. In addition, the fact that the United States held land for a petitioner in 1934 does not mean that the petitioner maintained existence as a community or exercised political authority over the group after that date. As a result, this section could apply to some petitioners that are made up of descendants of tribes for which a reservation was established (and continues to exist), but where these descendants had long since ceased to be affiliated with the tribe on the reservation or to form a community outside of it.

For example, in the Northwest and elsewhere, reservations were established or enlarged by treaties and executive orders for historic tribes. Many members of those historic tribes integrated into the reservation communities of tribes that are currently recognized by the United States, while others did not. Proposed § 83.11(b)(3)(ii) and (c)(3)(ii) would provide that petitioners demonstrate both community and political influence and authority without any additional evidence, if the United States has held land in trust for the petitioner or the petitioner's collective ancestors at any time between 1934 and the present.

Similar factors were specifically rejected as meeting criteria (b) and (c) in the petition submitted by the Chinook Indian Nation/Chinook Tribe ("CIN/CT") pursuant to Part 83.

In the case of the Quinault Nation, the United States opened our Reservation for allotment through several Acts of Congress. "The 1911 Quinault Allotment Act authorized allotments for "members" of certain 'tribes' affiliated with the Quinault and Quileute tribes 'in' an 1855/56 treaty. The Department granted allotments to indi-

vidual Chinooks without requiring membership in a Chinook tribe, and contended at the time that a Chinook tribe no longer existed." *See* Reconsidered Final Determination Against Federal Acknowledgment of the CIN/CT, at 16 (July 5, 2002). In denying the CIN/CT application for acknowledgment, the Secretary found that reference to the Chinook and "other tribes" as eligible for allotments was, by itself, insufficient to substantiate that the Chinook then comprised an existing tribe acknowledged by Congress as a distinct tribe still in existence.

In 1912, Congress heard from the Chinook descendants through their attorney. The topic was U.S. payments for cessions described in an 1851 treaty negotiated with the then existing Chinook people. Congress never ratified the treaty, and when it considered payments to Chinook people, Congress considered payments only being made to descendants of a tribe that no longer existed.

In 1925, Congress enacted another piece of claims legislation that authorized several "Tribes or Bands of Indians," including the "Chinook," to bring claims "as parties plaintiff' against the United States. Act of February 12, 1925. In 1934, the Court of Claims then found claims filed by the Chinook descendants pursuant to this Act to be without merit.

Finally, Federal courts in the 1931 *Halbert v. United States* litigation found that the Chinook did not constitute an Indian tribe. At the District Court level in the *Halbert* case, the United States argued that the Chinook descendants were without tribal affiliation or tribal relations, and implied that they were "descendants who have separated from tribal life." The District Court, accepting the factual premise of the government's argument, concluded that the Chinook tribe had "no tribal organization." While not directly addressing the issue, the U.S. Supreme Court essentially upheld the District Court's ruling that the Chinook held no ". . . tribal organization [but instead] are 'remnants of bands and tribes.'"

These court rulings and legislative interpretations weighed heavily in the Interior Department's denial of recognition of the Chinook descendants. The Secretary found that the Chinook failed to satisfy the mandatory criteria under the FAP to meet the "distinct community" and "political authority". *See* Department of the Interior, Reconsidered Final Determination Against Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation (CIT/CN) (July 5, 2002) (online at http://www.bia.gov/cs/groups/xofa/documents/text/idc-001489.pdf). The Department, in the Reconsidered Final Determination, also properly relied on and deferred to the expertise of the Bureau of Acknowledgment and Recognition's 1997 Proposed Findings in reaching these conclusions.

Despite adverse decisions, the Chinook people have consistently maintained that they should be federally recognized, are eligible to exercise Quinault treaty hunting and fishing rights, and possess the rights to govern actions and activity on the Quinault Indian Reservation. The BIA's proposed FAP revisions hold great potential to overturn these decisions and force the Quinault Nation to re-litigate these attacks on our sovereignty. As a result, we strongly oppose the proposed revisions to change the starting date to prove "community" and "political authority" to "1934", and we strongly oppose adding the factor that "the United States has held land for the petitioner or collective ancestors at any point in time from 1934 to the present" as dispositive evidence of meeting the "distinct community" and "political authority" criteria.

CONCLUSION

The Quinault Indian Nation does not oppose or challenge the right of any group to seek a political relationship with the Federal Government. However, we must oppose Federal actions that hold the potential to jeopardize the Quinault Indian Nation's treaty rights or inherent rights to govern our homelands. The BIA's proposed FAP revisions, if made final in their current form, will re-open settled decisions, force us to re-litigate and defend our treaty and sovereign rights. In addition, the proposed revisions fail to uphold or establish safeguards to protect the Federal Government's treaty and trust obligations to existing federally recognized tribes.

The Quinault Nation has a great deal of respect for the Chinook Indian people. The issues that we raise today relate to the fundamental principle that the United States has a unique relationship with all Indian tribes, which includes each tribe's unique position deeply rooted in historic and cultural values. The Quinault Nation has a longstanding and unique relationship with the United States. Our Nation's inherent rights emanate from that relationship, which are outlined in our Treaty with the United States.

The Quinault Nation has invested nearly a century in defending our treaty rights and sovereignty from legal, administrative, and legislative challenges. Under no cir-

cumstances should the Administration dredge up the past and force us to re-litigate these past settled decisions.

The Quinault Indian Nation cannot support the proposed revisions to the FAP as they hold the potential to threaten the Quinault treaty rights reserved under the Treaty of Olympia. In sum, the proposed revisions to the BIA Federal Acknowledgment Process—while well intended—are flawed.

I again thank the subcommittee for this opportunity to testify today and urge you to work with the Administration to ensure that if the revised FAP regulations are made final that they address the concerns discussed in this statement.

Mr. YOUNG. Fawn, I just make one suggestion. You are going to be late.

Ms. SHARP. Yes.

Mr. YOUNG. And we would—if we have questions, with the committee's indulgence, we will submit those to you, and we expect an answer back.

Ms. SHARP. Yes. I will commit to answer those. Thank you.

Mr. YOUNG. Thank you. And you are excused. Oh, I love that—I am an old school teacher. "You are excused," you know?

All right. Mr. Cladoosby, Brian, National Congress of American Indians, Embassy of the Tribal Nations.

STATEMENT OF BRIAN CLADOOSBY, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, EMBASSY OF TRIBAL NATIONS, WASHINGTON, DC

Mr. CLADOOSBY. Chairman Young, Ranking Member Ruiz——

Mr. YOUNG. Make sure your microphone is on.

Mr. CLADOOSBY. Yes. Get closer?

Mr. YOUNG. Yes.

Mr. CLADOOSBY. Chairman Young, Ranking Member Ruiz, members of this committee, on behalf of the National Congress of American Indians, thank you for the opportunity to discuss this central issue in the relationship between tribes and the Federal Government. My name is Brian Cladoosby. My traditional name is Spee-pots. I am President of the National Congress of American Indians. I have served as a leader in Indian Country for 30 years, including 18 years as the chairman of my tribe.

NCAI has always had a balanced position on Federal recognition. Indian tribes are protective of their status as sovereigns, and there have never been enough Federal resources to meet the trust responsibilities to those tribes who are currently recognized.

NCAI certainly does not support the creation of new Indian tribes, and does not believe the proposed rule would allow for this. But NCAI does support an effective and efficient administrative system to recognize existing tribes.

But the leadership of NCAI has always known that Indian tribes exist who have never been recognized by the Federal Government and should be. That is the purpose of Interior's acknowledgment process, originally created in 1978. This process has deteriorated over the decades since the regulations were adopted. It fails even the simplest metric: time.

The most recent Federal acknowledgment decisions have been pending for sometimes more than 35 years, and such delays are the norm. NCAI strongly supports the revisions to the Federal acknowledgment regulations, because they address a basic need for

efficiency to quickly issue denials to applications that lack merit, and to focus on legitimate applications.

In recent years, significant concerns have also been raised when actions during the acknowledgment process created the appearance that political forces influenced the decisions. NCAI and its members are committed to a fair and equitable process that results in a timely determination. The proposed rule creates an avenue for appeal to an administrative law judge that should help in addressing concerns about politicization.

While the proposed rule will improve the process, the fundamental standards remain the same. The acknowledgment process is intended to recognize those tribes that have existed since historic times as living, political, and cultural groups, and to deny recognitions to groups that have not. The NCAI membership has supported the proposed changes through NCAI resolution, TUL–13–002, supporting the Bureau of Indian Affairs proposed reform of the Federal recognition process, which I have attached to my testimony.

When tribal applications for Federal acknowledgment increased during the 1970s, NCAI called a special convention of its members to discuss Federal acknowledgment. It was a controversial issue, just like it is today. But the tribal leaders worked through it, and came up with a united position. Our members expressed their support for the establishment of Federal standards and an accountable decisionmaking process. They believed that a tribe should demonstrate a continuous history of tribal relations in order to receive Federal acknowledgment. The principles articulated at that convention developed into the current Federal acknowledgment process that is codified at 25 CFR Part 83.

At the NCAI conference in 1978, the BIA's Director of Bureau of Acknowledgment and Recognition, Bud Shepard, said to the tribal leadership—and I am quoting—"We envision that we will have somewhere around 150 applicants, and depending on the staff that is assigned to the project, we estimate about 4 years to do the bulk of the work." Today it is 37 years later, and the BIA has resolved only 51 applications—34 have been denied and only 17 granted. The most recent decisions have been on applications that were pending for more than 35 years. This is a broken system, and the process needs to work much more efficiently.

NCAI supports procedural amendments to fix these problems, and supports the maintenance of very high standards for Federal acknowledgment. We are grateful that you have devoted the time to consider this pressing issue, and we thank you for your diligent efforts on behalf of Indian Country on this and so many other issues.

Thank you very much, Mr. Chairman. And if you have any questions, I would be more than happy to answer.

[The prepared statement of Mr. Cladoosby follows:]

PREPARED STATEMENT OF BRIAN CLADOOSBY, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

On behalf of the National Congress of American Indians, thank you for the opportunity to discuss this central issue in the relationship between tribes and the Federal Government. My name is Brian Cladoosby and I am President of the National Congress of American Indians. I have served as a leader in Indian Country for 30 years, including 15 years as Chairman of my tribe.

NCAI has always had a balanced position on Federal recognition. Indian tribes are protective of their status as sovereigns, and there have never been enough Federal resources to meet the trust responsibilities to those tribes who are currently recognized. NCAI certainly does not support the creation of new Indian tribes, and does not believe that the proposed rule would allow for this.

But the leadership of NCAI has always known that Indian tribes exist who have never been recognized by the Federal Government and should be. That is the purpose of Interior's acknowledgement process originally created in 1978. This process has deteriorated over the decades since the regulations were adopted. It fails even the simplest metric: time. As the committee is aware, the most recent Federal acknowledgment decisions have been pending for 35 years. Such delays are the norm. NCAI strongly supports the revisions to the Federal acknowledgment regulations because they address a basic need for efficiency, to quickly issue denials to applications that lack merit and to focus on legitimate applications.

In recent years significant concerns have also been raised when actions during the acknowledgment process created the appearance that political forces influenced the decisions. NCAI and its members are committed to a fair and equitable process that results in a timely determination. The proposed rule creates an avenue for appeal to an Administrative Law Judge that should help in addressing concerns about fairness.

While the proposed rule will improve the process, the fundamental standards remain the same. The acknowledgement process is intended to recognize those tribes that have existed since historic times as living political and cultural groups, and to deny recognition to groups that have not. The NCAI membership has supported the proposed changes through NCAI Resolution TUL–13–002, Supporting the Bureau of Indian Affairs Proposed Reform of the Federal Recognition Process, which I have attached to my testimony.

HISTORICAL BACKGROUND ON FEDERAL RECOGNITION OF INDIAN TRIBES

The first Federal-tribal relations were created through treaties under the U.S. Constitution. Many tribes, however, never entered a treaty with the United States. These tribes were either too peaceful to be considered a military threat, too small or isolated to be noticed, or possessed nothing that the United States desired. Other tribes simply refused to enter into a treaty with the United States. By 1871 treaty-making was replaced by the making of agreements, and the making of agreements ceased in practice by 1913. These methods of establishing recognition were thus closed to many tribes. The Commissioner of Indian Affairs foresaw trouble when he wrote in 1872:

> This action of Congress . . . presents questions of considerable interest and much difficulty, viz: What is to become of the rights of the Indians to the soil over portions of territory which had not been covered by treaties at the time Congress put an end to the treaty system? What substitute is to be provided for that system, with all its absurdities and abuses: How are Indians, never yet treated with, but having in every way as good and complete rights to portions of our territory as had the Cherokees, Creek, Choctaw and Chickasaws, for instance, to the soil of Georgia, Alabama and Mississippi, to establish their rights? [1]

The process of Federal recognition was altered by the passage of the Indian Reorganization Act in 1934. For almost 50 years after the Indian Reorganization Act (IRA), the Bureau of Indian Affairs (BIA) employed an informal acknowledgement process based on the ratification of tribal constitutions. A tribe would submit an IRA constitution to the Secretary of the Interior. If the Secretary approved the constitution, that approval constituted Federal acknowledgement of the tribe. For years, the Secretary based the decision on criteria listed in Felix S. Cohen's *Handbook of*

[1] Annual Report of the Commissioner of Indian Affairs, 1872, quoted in the Final Report of the American Indian Policy Review Commission, p. 466.

Federal Indian Law. However, the factors listed in the Handbook were not considered exhaustive. By the 1970s, the Interior Solicitor indicated he did not think the Handbook factors were adequate, and he was concerned that the "Department ha[d] no established procedures for making the recognition determination."[2]

NCAI AND FEDERAL ACKNOWLEDGEMENT

As tribal applications increased during the 1970s, NCAI called a special convention of its members to discuss Federal acknowledgement. It was a controversial issue, but the tribal leaders worked through it and came up with a united position. Our members expressed their support for the establishment of Federal standards and an accountable decisionmaking process. They believed that a tribe should demonstrate a continuous history of tribal relations in order to receive Federal acknowledgement. The principles articulated at that convention developed into the current Federal acknowledgement process that is codified at 25 C.F.R. Part 83.[3]

At the NCAI conference in 1978, the BIA indicated it would work quickly to resolve applications for Federal acknowledgment. "We envision that we will have somewhere around 150 applicants and depending on the staff that's assigned to the project, we estimate about 4 years to do the bulk of the work . . ."[4]

Today it is 37 years later and the BIA has resolved only 51 applications. Thirty-four have been denied and only 17 granted. The most recent decisions have been on applications that were pending for more than 35 years.

The documentation required also adds to the delay and raises questions about the acknowledgement process. The number and scope of the documentation requirements place an untenable burden on tribes attempting to engage in good faith with the Secretary. These requests defy the historical and cultural realities of tribal existence over the last centuries. They appear to change with each passing year.

Most troublingly, there are significant questions about the fairness and integrity of the process. In recent years, significant concerns have been raised among our members and the public at large when actions during the acknowledgment process created the appearance that political forces shaped the nature of the process and influenced the outcome of acknowledgement decisions.

The profound importance of Federal acknowledgement makes the problems throughout the acknowledgment process all the more pressing. We urge you to support a fair and equitable acknowledgment process that ensures prompt action based on impartial criteria.

NCAI's position on Federal acknowledgement remains unchanged since its formative convention on the issue over 30 years ago. NCAI and its members are committed to high standards for Federal acknowledgement, but also a fair and equitable process free of political considerations that results in a timely determination on each application for Federal acknowledgement.

We continue to believe the central question in Federal acknowledgement is whether the tribe has maintained tribal relations from historic times. All inquiries in the process should be targeted to answering this narrow question. The inquiry should not be so broad that the acknowledgement process functionally closes the door on deserving tribes by requiring an impossibly large amount of evidence of disparate activities over vast stretches of time. The process should include consideration of the historical and cultural realities informing each tribe's relationship with the Federal Government.

NCAI urges the committee to support reforming the process to ensure timely, transparent, and fair consideration of each application.

RECONSIDERATION AND THIRD PARTY VETO

The proposed regulation will allow those applicants who were previously denied to resubmit their applications under the revised rules. Because the standards in the rule are unchanged and only the procedures are improved, NCAI supports this change. Those tribes who were denied because of undue political influence should have another chance.

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[2] Letter from Interior Solicitor Kent Frizzell (Feb. 26, 1975).

[3] For an in depth discussion, see "An Historical Perspective on the Issue of Federal Recognition and Non-Recognition," Institute for the Development of Indian Law, Prepared for the National Congress of American Indians in conjunction with the NCAI Conference on Federal Recognition, March 28–30, 1978.

[4] Quote from the Director of the Bureau of Acknowledgement and Recognition, Bud Shepard, in the transcript for the NCAI Conference on Federal Recognition, March 28, 1978.

Notwithstanding the proposed change, the Department would also allow states and local governments to decide whether tribal nations can re-petition for recognition, and by doing so, the Department has given states and others a veto over Federal decisionmaking. For example, the Eastern Pequot Tribal Nation would need to obtain the consent of the state of Connecticut and each of 29 towns simply to be allowed to re-petition for recognition under the proposed regulations. Delegating such authority to states and others is an abdication of the Department's trust responsibility for tribal nations and creates a dangerous precedent which empowers third parties to interfere in the exercise of the Department's trust responsibility. NCAI opposes the third party veto pursuant to NCAI Resolution ATL–14–012.

CONCLUSION

The current Federal acknowledgement process is broken. Despite the best intentions of those that created the process and those that currently administer it, the process simply does not work. It subjects tribes to unconscionably long delays and unreasonable documentary requests. It establishes a seemingly objective list of criteria but provides no guarantees of objectivity or fairness in their application. These problems cause incalculable harm. The length of the process leaves tribes suspended in limbo, unable to guarantee services to their members or to prove to state and local governments that the Federal Government recognizes the tribe's sovereignty. The lack of transparency casts doubt on the Federal Government's willingness to faithfully perform its trust responsibilities. And the increasing demands on tribes in the process inflict hundreds of hundreds of thousands of dollars of unnecessary costs every year.

NCAI supports the procedural amendments to fix these problems, and supports the maintenance of very high standards for Federal acknowledgment. We are grateful that you have devoted the time to consider this pressing issue, and we thank you for your diligent efforts on behalf of Indian country on this and so many other issues.

Attachments:

NCAI Resolutions TUL–13–002, ATL–14–012, PHX–08–055

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Ute Mountain Tribe

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The National Congress of American Indians
Resolution #TUL-13-002

TITLE: Supporting the Bureau of Indian Affairs Proposed Reform of the Federal Recognition Process

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, during the 2012 Annual Conference of the NCAI in Sacramento, California, Assistant Secretary - Indian Affairs Kevin Washburn addressed both the NCAI General Assembly stating that a major priority for the BIA was the reform of the Federal Acknowledgment Process; and

WHEREAS, on March 19, 2013, Assistant Secretary - Indian Affairs Kevin Washburn testified before the Senate Committee on Indian Affairs, acknowledging the criticism that the Federal Acknowledgment Process has become "expensive, inefficient, burdensome, intrusive, less than transparent and unpredictable," further indicating that the Bureau of Indian Affairs (BIA) was "reviewing our existing regulations to consider ways to improve the process to address these criticisms"... and to promote transparency, timeliness , efficiency, and flexibility; and

WHEREAS, on June 21, 2013, Assistant Secretary - Indian Affairs Kevin Washburn announced a discussion draft of potential changes to the Department of the Interior's "Part 83" process for federal acknowledgment of tribes, with the BIA subsequently conducting a series of consultations and hearings, receiving both oral and written testimony regarding that draft; and

WHEREAS, the NCAI was founded to protect and advance Tribal Governance and Tribal Sovereignty in direct response to termination and assimilation policies that the United States had and continues to sponsor; and

WHEREAS, the NCAI recently reaffirmed and broadened the eligibility for membership of tribes not yet listed by the BIA as federally recognized, thereby affirming that NCAI 's mission implicitly includes advancing the interest of those member tribes; and

WHEREAS, while the FAP established a framework to document justification of tribal status, recent proceedings have raised the threshold for documented petitions beyond the few hundred pages initially required to approaching get 200,000 pages, and then only after federal court intervention following 30 years of administrative delay; and

WHEREAS, the United Nations Declaration on the Rights of Indigenous Peoples states that Indigenous peoples have the right (inter alia) of self-determination, self-government in matters relating to their internal and local affairs [Article 4], the right to "distinct political, legal, economic, social and cultural institutions" [Article 5], "the right to the recognition, observance, and enforcement of treaties, agreements and other constructive arrangements concluded with the States or their successors and to have States honour and respect such treaties agreements and other constructive arrangements" [Article 36] and that States shall "take the appropriate measures, including legislative measures, to achieve the ends of this Declaration" [Article 38]; and

WHEREAS, the August 30, 2012 addendum on the situation of indigenous peoples in the United States of America in the Report of the Special Rapporteur, James Anaya, on the rights of indigenous peoples to the United Nations General Assembly mentions the inequities of the federal acknowledgment process and how it has left many tribes "especially disadvantaged" and reports the opinion that "it is not a system that is working under any stretch of the imagination;" and

WHEREAS, the proposed reform is consistent with NCAI Resolution # PHX-08-055 "NCAI Policy on Federal Recognition of Indian Tribes," which cited the inequities of the Federal Acknowledgment Process (FAP), asserting that the FAP has "severely deteriorated since its beginning, with unreasonable decades-long delays in considering applications, irrational documentation requirements that defy historical and cultural realities, and [there are] legitimate questions about the fairness and integrity of the process" and that the FAP "has strayed from its original intentions, and has become a barrier to federal recognition, rather than a fair process for facilitating recognition of tribes who meet the criteria" and that the NCAI "strongly urges the Department of Interior to repair the administration of the FAP process to ensure that applications are considered in a reasonable time, that the documentation requirements for the criteria are fair and allow applicants to address gaps in the historical record, and that the integrity of the process is restored."

NOW THEREFORE BE IT RESOLVED, that the NCAI supports the current process of the BIA to reform the "Part 83" federal acknowledgment process and that the NCAI supports, as a matter of long overdue justice and fairness, the BIA's efforts to review, address, and modify the particular areas of the regulations that have wrongfully become an obstacle to the recognition of legitimate tribes; and

BE IT FURTHER RESOLVED, that the NCAI calls on the BIA to ensure that the reform of the Part 83 regulations results in a fair and just process for the acknowledgment of Indian tribes unjustly left off of the list of federally recognized tribes; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2013 Annual Session of the National Congress of American Indians, held at the Cox Business Center from October 13 - 18, 2013 in Tulsa, Oklahoma with a quorum present.

President

ATTEST:

Recording Secretary

The National Congress of American Indians
Resolution #ATL-14-012

TITLE: Support for Continued Federal Recognition of the Eastern Pequot Nation and Removal of Third Party Veto from Proposed Final Recognition Process

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the NCAI supports the federal recognition process and supports the efforts of the Department of the Interior to make much needed changes to the regulations governing such process; and

WHEREAS, the Department took the step in the initial draft to allow those who meet the changed regulations to renew their request for recognition. This was necessary; otherwise, tribal nation who had not yet petitioned could be recognized under the amended regulations while tribal nations who also meet the requirements of the changed regulations would not be recognized; and

WHEREAS, notwithstanding the proposed change, the Department would now also allow certain states and local governments to decide whether tribal nations can re-petition for recognition, and by doing so, the Department has given states and others a veto over federal decision-making; For example, the Eastern Pequot Tribal Nation would need to obtain the consent of the State of Connecticut and each of twenty-nine towns simply to be allowed to repetition for recognition under the proposed regulations; and

WHEREAS, delegating such authority to states and others is an abdication of the Department's trust responsibility for tribal nations and creates a dangerous precedent which empowers third parties to interfere in the exercise of the Department's trust responsibility; and

WHEREAS, the United Nations Declaration of the Rights of Indigenous Peoples and the World Conference on Indigenous Peoples Outcome Document recognize the obligation of the nation states of the world to maintain a relationship with its Indigenous Peoples; and

WHEREAS, NCAI further urges states and its representatives to recognize their legal, historical and political relations with the tribal nations whose tribal, social and political structures predate the creation of the United States and the establishment of the respective state governments and to engage in good faith dealings on issues of mutual concern and to refrain from using the Department's political and regulatory processes and the courts to delay legitimate federal recognition.

NOW THEREFORE BE IT RESOLVED, that NCAI urges the Department to protect tribal sovereignty, tribal governmental status, self-determination, health and welfare and therefore remove the third party veto provision and allow all tribal nations an equal opportunity to apply for recognition under reformed federal regulations; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2014 Annual Session of the National Congress of American Indians, held at the Hyatt Regency Atlanta, October 26-31, 2014 in Atlanta, Georgia, with a quorum present.

President

ATTEST:

Recording Secretary

NATIONAL CONGRESS OF AMERICAN INDIANS

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The National Congress of American Indians
Resolution #PHX-08-055

TITLE: NCAI Policy on Federal Recognition of Indian Tribes

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, federal recognition is of fundamental importance for tribes who are seeking recognition to protect and serve their people, and for the recognized tribes that depend on federal support of tribal sovereignty, treaty rights, and the trust responsibility; and

WHEREAS, NCAI has long supported federal recognition for all Indian tribes that have maintained tribal relations from historical times; and

WHEREAS, in the mid-1970's NCAI member tribes supported the establishment of federal standards and an accountable decision making process for official recognition of tribal governments, which developed into the current Federal Acknowledgement Process (FAP) that is codified at 25 C.F.R. Part 83; and

WHEREAS, the FAP process has severely deteriorated since its beginning, with unreasonable decades-long delays in considering applications, irrational documentation requirements that defy historical and cultural realities, and legitimate questions about the fairness and integrity of the process; and

WHEREAS, the FAP process has strayed from its original intentions, and has become a barrier to federal recognition, rather than a fair process for facilitating recognition of tribes who meet the criteria; and

WHEREAS, as a result of the FAP's failings, in recent years more and more unrecognized tribes have come to NCAI seeking resolutions to support their federal recognition; and

WHEREAS, NCAI strongly supports federal recognition of all Indian tribes that have maintained tribal relations from historical times, however the NCAI resolutions process is not equipped to investigate and make determinations on historical and genealogical questions of tribal status, and the consideration of these issues often leads to intra-tribal and inter-tribal conflicts; and

WHEREAS, NCAI needs a clear policy on federal recognition in order to advocate for improvements to the FAP process, to avoid intra-tribal and inter-tribal conflicts, to ensure thorough and respectful investigation of tribal status consistent with the importance of federal recognition, and to be able to communicate with Members of Congress about NCAI's position.

NOW THEREFORE BE IT RESOLVED, NCAI strongly urges the Department of Interior to repair the administration of the FAP process to ensure that applications are considered in a reasonable time, that the documentation requirements for the criteria are fair and allow applicants to address gaps in the historical record, and that the integrity of the process is restored; and

BE IT FURTHER RESOLVED, that the NCAI urges Congress to exercise oversight on the FAP process and to appropriate sufficient funds to carry out the objectives of this resolution; and

BE IT FURTHER RESOLVED, that the NCAI strongly supports federal recognition of all Indian tribes that have maintained tribal relations from historical times, their right to timely and fair consideration of their applications under the FAP process, and their right to seek alternative means for recognition of their status as Indian tribes; and

BE IT FINALLY RESOLVED, that the NCAI hereby amends the NCAI Standing Rules of Order Section XIII to include the following provision: "A resolution that supports the federal acknowledgement or recognition of an unrecognized tribe shall require one co-sponsoring NCAI member tribe *and must be presented at a prior NCAI Annual, Midyear, or Executive Council Session."* Such resolutions are subject to all NCAI standing rules including rules governing conflicts.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2008 Annual Session of the National Congress of American Indians, held at the Phoenix Convention Center in Phoenix, Arizona on October 19-24, 2008, with a quorum present.

President

ATTEST:

Recording Secretary

Mr. YOUNG. Thank you, Brian.

Robert Martin, Morongo Band of Indians, my good friend's tribe, I think. Just remember that when election comes up, OK?

[Laughter.]

Mr. YOUNG. I am campaigning for you.

STATEMENT OF ROBERT MARTIN, MORONGO BAND OF MISSION INDIANS, BANNING, CALIFORNIA

Mr. MARTIN. Mr. Chairman, Dr. Ruiz, and members of the subcommittee, thank you for providing the Morongo Tribe this opportunity to testify before you today.

The issue we are discussing is fundamental to all of Indian Country: the standard by which the United States determines which groups of native peoples should be treated as sovereign governments. After having reviewed the proposed revisions to the Federal acknowledgment regulations, we fear that the proposed changes threaten the fabric that currently binds all tribal nations. In short, the proposed revisions would dramatically weaken the Federal acknowledgment process and, in doing so, undermine the significance of tribal sovereignty. As such, we ask that the Department of the Interior withdraw the proposed rule in its entirety.

In our view, one of the most egregious changes in the proposed rule would only require petitioners to demonstrate tribal existence since 1934. This is nonsensical. Tribal governments possess inherent sovereignty, not because Congress granted it, but because we existed as independent sovereigns before the United States adopted its own Constitution. The Supreme Court has recognized that one aspect of our inherent sovereignty, sovereign immunity, is coextensive with that of the United States.

That is why presently the Federal acknowledgment regulations require a demonstration of tribal existence from the founding of the United States in 1789, or first sustained contact if later than 1789. We are concerned that by weakening this standard the Department is redefining what it means to be a sovereign tribal government in this country.

We strongly believe that the source of our sovereignty comes from the fact that our government existed long before the Constitution and our first contact with settlers in the area. We simply can't understand the rationale behind this change, and we urge the Department to maintain its existing standard.

Our second major concern is the watering down of the requirement for external identification. Under the existing rules, petitioners must provide evidence of identification by external sources since 1900. This helps the government differentiate historic tribes from groups who only recently asserted tribal heritage. The proposed revisions would replace the strong standard with a lesser requirement that a petitioner provide only a brief narrative with supporting documentation.

We can't understand why a legitimate petitioner couldn't produce external documentation of its existence. Consequently, we believe it is critical that the existing criteria for external identification by outside observers such as scholars, media, and state and local governments be preserved.

Third, we are greatly concerned that the Department's proposal allows groups to use evidence with substantial interruption. The proposal goes on to explain that this means the Department would allow evidentiary gaps of 20 years or more. This is a far cry from the current, more rigorous standard that requires a substantially continuous existence, and we do not believe the Department adequately justifies the need to weaken the current rules.

The fourth and final issue we are concerned about is that the Department's proposal would allow previously denied petitioners an opportunity to re-petition. This would mean that, in addition to the 68 California groups whose petitions are pending before the Department of the Interior, the 6 California petitioners that have already been denied acknowledgment will have an opportunity to go through the process again under much less stringent standards.

We hope this committee will encourage the Department to rethink the proposal, to revisit these applications, because doing so would create two classes of tribes: one that can meet the current exacting standards, and those who can't. As this committee knows, creating two classes of tribal governments is a recipe for disaster in Indian Country.

It is worth noting that many of the petitioners in our state appear to be from California's densest urban areas. We don't believe that this is a coincidence. We fear that lower recognition standards could lead to an influx of reservation-shopping proposals. For your reference, with my written testimony I included a map illustrating our locations of the 68 petition groups in California. As you will see, there are currently four groups petitioning for Federal recognition in the urban areas of our home Riverside County alone.

Please know that we appreciate how difficult it is to expedite the acknowledgment process while preserving the rigorous standards needed to ensure that tribes can continue to enjoy benefits of sovereignty. A strong process is the only way Indian Country can fully distinguish the difference between being a tribe with inherent governmental rights and powers and being a group of individuals that is nothing more than what the Supreme Court calls private voluntary organizations. The legitimacy of the Federal acknowledgment process, no matter how cumbersome, must be protected.

Thank you for your consideration of our concerns.

[The prepared statement of Mr. Martin follows:]

PREPARED STATEMENT OF ROBERT MARTIN, CHAIRMAN, MORONGO BAND OF MISSION INDIANS

Mr. Chairman, Doctor Ruiz and members of the subcommittee, thank you for providing the Morongo Tribe with this opportunity to testify before you today. As you know, the Morongo Tribe is located in Riverside County, California, about 20 miles west of Palm Springs.

The issue we are discussing is fundamental to all of Indian Country—the standard by which the United States determines which groups of native peoples should be treated as sovereign governments. Establishing a standard that is too restrictive potentially denies legitimate groups the unique rights provided to a sovereign government. Conversely, setting the bar too low undermines the political relationship between federally acknowledged tribes and the United States.

After having reviewed the proposed revisions to the Federal acknowledgment regulations, the Morongo Tribe believes the Department is setting the bar far too low. We fear that the proposed changes threaten the fabric which currently binds all tribal nations and we ask that the Department of Interior withdraw the proposed rule in its entirety.

The Morongo Tribe does not take this issue lightly. In fact, along with a number of tribes throughout the United States, we asked some of the most well respected scholars within the field of tribal acknowledgement to help us understand the technical aspects of the proposed rule.

The assessments by these experts confirmed our own concerns and conclusions that the proposed revisions would fundamentally change both the *criteria* and *procedures* used to review petitions for Federal acknowledgement. And in short, the proposed revisions would dramatically weaken the Federal acknowledgement process and in doing so, undermine the significance of tribal sovereignty.

In our view, one of the most egregious changes in the Proposed Rule is that the proposal would only require petitioners to demonstrate tribal existence since 1934. This is nonsensical.

Tribal governments possess inherent sovereignty, not because Congress granted it, but because we existed as independent sovereigns before the United States adopted its own Constitution. The Supreme Court has recognized that one aspect of our inherent sovereignty, sovereign immunity, is coextensive with that of the United States. That is why presently, the Federal acknowledgement regulations require a demonstration of tribal existence from the founding of the United States in 1789, or first sustained contact, if later than 1789.

The Morongo Tribe is concerned that by weakening this standard, the Department is redefining what it means to be a sovereign tribal government in this country. We strongly believe that the source of our sovereignty comes from the fact that our government existed long before the Constitution and our first contact with settlers in the area. We simply cannot understand the rationale behind this change, and we urge the Department to maintain its existing standard.

Our second major concern is the watering down of the requirements for external identification.

Under the existing rules, petitioners must provide evidence of identification by external sources since 1900. This helps the government differentiate historic tribes from groups who only recently assert tribal heritage.

The proposed revisions would replace this strong standard with a lesser requirement that a petitioner provide only a brief narrative with supporting documentation. We cannot understand why a legitimate petitioner could not produce external documentation of its existence. Consequently, we believe it is critical that the existing criterion for external identification by outside observers such as scholars, media, and state and local governments be preserved.

Third, we are greatly concerned that the Department's proposal allows groups to use evidence with "substantial interruption." The proposal goes on to explain that this means the Department would allow evidentiary gaps of 20 years or more. This is a far cry from the current, more rigorous standard that requires a "substantially continuous existence" and we do not believe the Department adequately justifies the need to weaken the current rules.

The fourth and final issue we are concerned about is that the Department's proposal would allow previously denied petitioners an opportunity to re-petition.

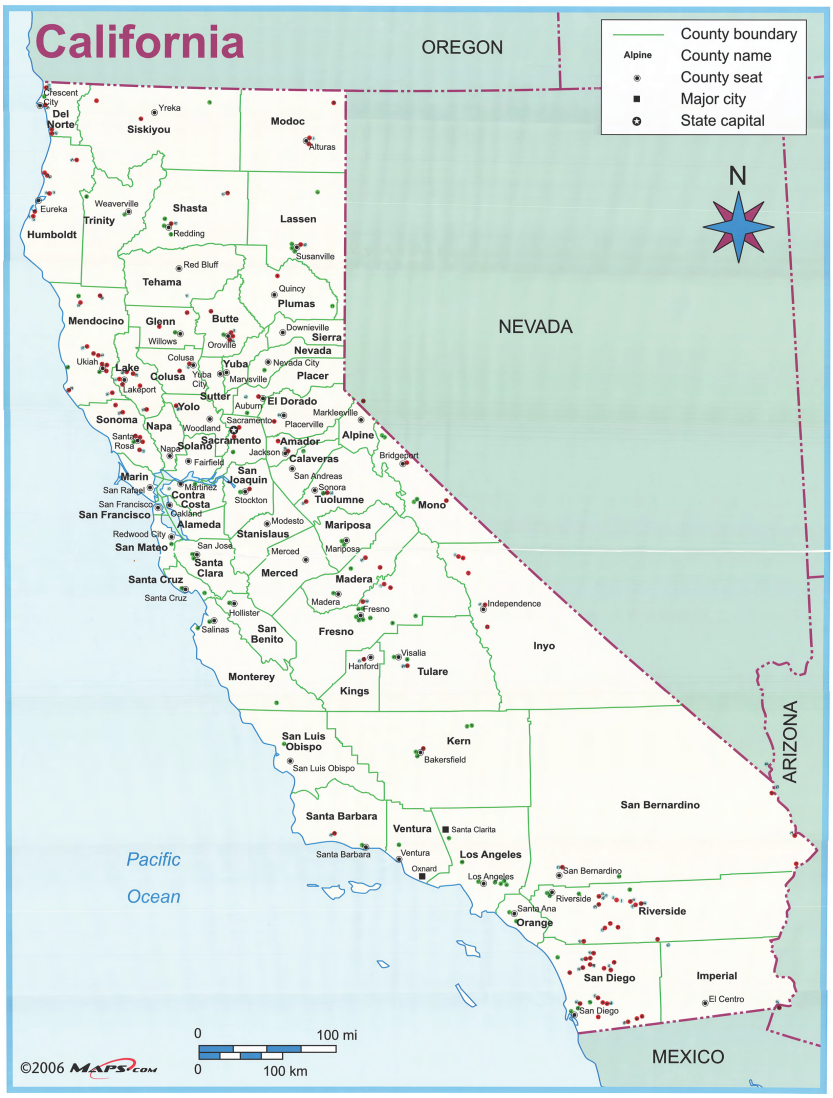
This would mean that in addition to the 68 California groups whose petitions are pending before the DOI, the 6 California petitioners that have already been denied acknowledgment will have an opportunity to go through the process again under much less stringent standards. We hope this committee will encourage the Department to rethink the proposal to revisit these applications, because doing so would create two classes of tribes—ones that can meet the current exacting standards and those who cannot. As this committee knows, creating two classes of tribal governments is a recipe for disaster in Indian Country.

It is worth noting that many of the petitioners in our state appear to be from California's densest urban areas. The Morongo Tribe does not believe this is a coincidence; we fear the lower recognition standards could lead to an influx of reservation shopping proposals. For your reference, with my written testimony I included a map illustrating the locations of the 68 petitioning groups in California. As you will see, there are currently four groups petitioning for Federal recognition in the urban areas of our home Riverside County, alone.

Please know that the Morongo Tribe appreciates how difficult it is to expedite the acknowledgement process while preserving the rigorous standards needed to ensure that tribes can continue to enjoy the benefits of sovereignty. A strong process is the only way Indian Country can fully distinguish the difference between being a tribe with inherent governmental rights and powers, and being a group of individuals that is nothing more than what the Supreme Court calls "private, voluntary organizations." (*United States v. Mazurie*, 419 U.S. 544 (1975). The legitimacy of the Federal acknowledgement process, no matter how cumbersome, must be protected.

Thank you for your consideration of our concerns.

Attachment: Map



Mr. YOUNG. Thank you, Mr. Martin.
Glen Gobin.

STATEMENT OF GLEN GOBIN, VICE CHAIRMAN AND BUSINESS COMMITTEE CHAIR, TULALIP TRIBES, TULALIP, WASHINGTON

Mr. GOBIN. Good afternoon, Chairman Young, Ranking Member Ruiz, and committee members. My name is Glen Gobin, Vice-Chairman of the Tulalip Tribes. I would like to thank you for the opportunity to testify on the proposed rule that revises the Federal acknowledgment process.

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, Skykomish, and a number of other dependent allied bands who have occupied Puget Sound Region in Washington State since time immemorial. And we are signatory to the 1855 treaty at Point Elliot. Under the terms of that treaty, these tribes moved to the Tulalip Indian Reservation. In 1934 these same tribes, under the Indian Reorganization Act, chose to use the name Tulalip Tribes, as used today.

Tulalip Tribes is very concerned with the proposed rule change. In Washington State, there are 29 federally recognized tribes, 7 of which obtained Federal recognition under the acknowledgment process. Other groups were denied because they failed to demonstrate having maintained some resemblance of community structure and political authority since historical times, and were merely fractions of Indian descendants whose ancestors willingly chose to remain off reservation, where they assimilated into the larger society. Some of these groups claim to be who the Tulalip Tribes are today, or other tribes in the region. We can only conclude that the process has and is working, albeit lengthy.

When a group receives new Federal recognition as a sovereign Indian tribe, there can be significant practical impacts to existing tribes. There are competing cultural resource claims, where a new group claims authority over an existing tribe's cultural resources. There are off-reservation aboriginal areas and natural resources that may become subject to competing claims. And there are additional impacts on already underfunded trust obligations. The real potential for conflict grows when a group seeks Federal recognition that is not recognized by other tribes and does not meet the basic minimum standard for recognition as a sovereign nation.

I would like to address two points that we make in our written testimony. These are lowing the standard to obtain recognition, and allowing previously denied petitioners the ability to re-petition.

First, lowering the standard by changing the starting point to 1934 as a basis of evaluation creates a presumption of continuous community and political existence since before that time. And such a presumption is nowhere to be seen in fact or law. This requirement is purposeful, and clearly distinguishes between more recently formed groups and those petitioners who have maintained some resemblance of community structure and political authority long before 1934. The Department's primary explanation for this change is to reduce the administrative burden upon the Department, as well as the petitioner. The process for Federal acknowledgment should not be an easy process. And the consideration of administrative burdens is inappropriate, and should play no part for determining or establishing recognition.

The proposed rule would allow groups who have previously been denied acknowledgment another opportunity, under certain circumstances, to re-petition under this new, lower standard. When they have already had full and fair consideration, it did not meet the standards. We are not opposed to legitimate petitioners receiving recognition under the current standards, but lowering the standards devalues and undermines the existing sovereign Indian tribes who have maintained existence in the face of past Federal assimilation and termination policies.

The proposed rule goes well beyond what we feel were the intended and contemplated revisions. We ask the Department to reconsider the proposed rule, not lower the standards. Rather, move forward with procedural revisions that will address time frames, transparency, and consistency in decisionmaking processes.

Again, I thank the committee for the opportunity to share some concerns from Tulalip Tribes.

[The prepared statement of Mr. Gobin follows:]

PREPARED STATEMENT OF GLEN G. GOBIN, VICE CHAIRMAN, TULALIP TRIBES

Good afternoon Chairman Young, Ranking Member Ruiz and committee members, my name is Glen Gobin, Vice-Chairman of the Tulalip Tribes. I would like to thank you for the opportunity to testify on the Department of Interior's proposed rule that changes the Federal acknowledgment process.

INTRODUCTION

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, Skykomish, and a number of allied bands, who have occupied the Puget Sound region in Washington State since time immemorial, and were signatory to the 1855 Treaty of Point Elliot. Under the terms of the treaty, these tribes moved to the Tulalip Indian Reservation and in 1934 under the Indian Reorganization Act, chose to use the name the "Tulalip Tribes" which is named for a bay on the Reservation.

The Tulalip Tribes is very concerned with the proposed revision to 25 CFR Part 83 which extend well beyond an intention to streamline the process. Instead, the proposed rule lowers the standard of proof by which groups can establish recognition as a sovereign Indian tribe. Indeed, the revisions to the acknowledgment process would have a direct effect of watering down the acknowledgment determination itself, undermining the existing sovereign Indian tribes who have been in existence since time immemorial and who have maintained a tribal existence in the face of past Federal assimilation and termination policies.

In Washington State there are 29 federally recognized tribes, seven of which obtained Federal recognition under the Part 83 process. Other groups have petitioned but were denied because they could not demonstrate a continuous distinct community and political existence since historical times until the present. Some of these groups claim to be tribes who make up the Tulalip Tribes, or other tribes in the region. We can only conclude that the acknowledgment process has, and is working, albeit through a rigorous review process.

Moreover, when a group receives new Federal recognition as a sovereign Indian tribe, there can be significant practical impacts for existing tribes. There may be competing cultural resource claims where a new group claims authority over an existing tribe's cultural resources. There are off reservation aboriginal areas and natural resources that may become subject to competing claims. And, there are additional impacts on already underfunded trust obligations. This real potential for conflict grows when a tribe seeks Federal recognition that is not recognized by other tribes and does not meet basic minimum standards for recognition as a sovereign tribe.

For these reasons, the Tulalip Tribes opposes the proposed rule and has provided detailed comments to the Department of Interior on two occasions. We offer the following comments below to address a few of the more substantial revisions to Part 83.

1. Tulalip Opposes the Proposed Revision because it Lowers the Existing Standard for Establishing Recognition

The proposed rule allows a petitioning group to establish tribal existence by merely giving a "brief narrative" with minimal evidentiary support stating its existence as a tribe during the "historical period," defined as 1900 or earlier. This weakens the acknowledgment process by allowing acknowledgment of racial groups formed in recent history with no demonstration of continuous existence or identity throughout history as a sovereign Indian government, and based only on self-proclaimed identification with scant evidentiary support. The sovereign rights of American Indian tribes that are recognized through the acknowledgment process must be based on credible evidence demonstrating continuous existence as a sovereign Indian nation throughout history, not only in recent times.

Deleting 83.7(a), that requires that a petitioner demonstrate that it has been identified as an Indian entity since 1900, is unnecessary because if a petitioner can

meet the existing criteria in §§83.7(b) and 83.7(c), it should be able to meet §83.7(a). Furthermore, the year 1934 provides no basis to assume continuous community and political existence before that time and effectively creates a *presumption* of existence. Such a presumption is nowhere to be seen in fact or law. An individual's native ancestry and some resemblance of tribal existence starting in 1934 until present do not and should not entitle a group to a government-to-government relationship with the United States.

The proposed rule also contravenes settled case law. For example, in *U.S. v. Washington*, a petitioner unsuccessfully argued, "because their ancestors belonged to treaty tribe, they benefited from a presumption of continuing existence." The Federal court rejected this argument and found that a tribe must have functioned since treaty times as a "continuous separate and distinct Indian cultural or political communities" (641 F.2d 1374 (9th Circuit 1981)), concluding that a simple demonstration of ancestry is not sufficient; however, the proposed rule ignores this, and potentially allows Federal acknowledgment based on ancestry and some form of organization starting in 1934, this lower standard should not entitle a group to a sovereign government-to-government relationship with the United States.

The Department of Interior's primary explanation for this change is to reduce the administrative burden upon the Department as well as the petitioner. The process for Federal acknowledgement should not be an easy process, and the rationale of lowering administrative burdens is inappropriate to support a less than comprehensive process for determining and establishing Federal recognition as an Indian tribe.

2. Tulalip Opposes the Proposes Revision that Allow Groups to Repetition for Recognition

The proposed revision allows groups who have previously been denied acknowledgment, after full and fair consideration, another opportunity under certain circumstances to re-petition. The Department maintains that the proposed revisions do not lower the criteria for recognition; however, if the standard for recognition and review is not lower, then there is no purpose in allowing these groups who have already been through the acknowledgement process to re-petition. Again, criticisms of the acknowledgement process in the Congressional Record focus on the lack of timeliness, efficiency, and transparency, not the standards applied or the outcome of the acknowledgment decisions, yet the proposed rule will allow groups to reapply who have previously been determined not to be a tribe by the administration or the Federal courts.

Furthermore, because the proposed revisions to §83.7(b) is vaguely worded, the Bureau has admittedly failed to fully understand the effects of its allowance for re-petitioning under the new regulations. In particular, §83.4(b)(1)(ii)(A) merely requires a re-petitioning group to show that a change in the regulations "warrants reconsideration of the final determination," without providing any guidance as to how this standard should be applied or what kinds of changes are deserving of reconsideration. The Bureau itself admits that it has not done any analysis as to how these new regulations would affect past acknowledgment decisions, so the effect of this provision allowing for re-petitioning under the new regulations has not been fully understood.[1] Essentially, the Bureau proposes to open the door to an unknown number of petitioners for reconsideration based on a vague and poorly understood standard.

CONCLUSION

We are not opposed to legitimate petitioners receiving recognition under the current standards, but lowering the standards devalues and undermines the status of all Indian tribes, as sovereign political entities. The Tulalip Tribes does not support the majority of the Department's proposed revisions and we ask the Department to reconsider the proposed rule. Instead of lowering the standards for Federal recognition, we urge the government to limit revisions to correct procedural deficiencies that address time frames, transparency, and consistency in decisionmaking processes. The integrity of the Federal acknowledgment process should be upheld and maintained because with the exception of procedural deficiencies, the current substantive standards for Federal acknowledgement as a sovereign Indian tribe are fair and appropriate.

[1] Statement of Larry Roberts, Transcript of July 15, 2014 Tribal Consultation meeting, pg. 46.

Mr. YOUNG. Thank you, Glen.
Mr. Mitchell, Don.

STATEMENT OF DONALD C. MITCHELL, ATTORNEY AT LAW, ANCHORAGE, ALASKA

Mr. MITCHELL. Thank you, Mr. Chairman. As the Chairman may recall, since he was on the dais that afternoon, I first testified in front of this committee in 1977. And that was so long ago that, at the time, I had an almost full head of brown hair, and the Chairman had not a speck of gray in his beard. That is how long ago it was.

Over the years that have morphed into decades since, I have testified in front of the committee on numerous occasions about numerous subjects. And, most recently, in 2009 and 2011, the committee invited me to appear to discuss the *Carcieri* v. *Salazar* U.S. Supreme Court decision, in which the court found that the BIA had been flagrantly ignoring the intent of Congress as expressed in the text of Section 19 of the Indian Reorganization Act of 1934.

I appreciate the opportunity to come back with another invitation to talk about the proposed regulations that Assistant Secretary Washburn has published in the Federal Register. But, unlike Senator Blumenthal and the other witnesses who have expressed to you serious policy concerns about the content of those regulations, I have a more fundamental concern. And my concern is that the entire BIA recognition process has been invalid and unlawful since it was invented in 1978.

I understand that that is a serious statement. Unlike Assistant Secretary Washburn, I have never been the dean of a law school. But, like Assistant Secretary Washburn, I attended one. And like every law student, I have had classes in constitutional law and in administrative law. And there are three basic black-letter rules that I would hope that the Assistant Secretary would agree are uncontroverted in those legal areas.

The first is that the legislative authority of the United States of America is vested by the Constitution exclusively in the Congress, not in the executive branch. Exclusively in the Congress.

The second principle is that Congress can delegate its legislative authority to an executive branch agency, but it must do so in a statute. That statute must clearly communicate the delegation of authority.

And then, the third principle is that statute must contain standards that guide the Federal executive's exercise of the authority that has been conveyed by Congress.

In my written testimony I pointed out that none of the statutes that the BIA relies on today and relied on in 1978, if you read those statutes, they do not convey authority to do any of what the BIA has done.

In 1975—there is a letter attached to my testimony from the head of the BIA branch of tribal regulations saying that the solicitor had advised Secretary of the Interior, Rogers Morton, that the BIA had no such authority.

And this situation is not different from *Carcieri*. In *Carcieri*, the BIA did not like a policy decision that Congress had made in Section 19 of the Indian Reorganization Act. So, rather than com-

ing to you and having that Act amended, they just decided to ignore the law. In this particular situation, the Department, in 1978, decided that it wanted to start inventing new Indian tribes, but it didn't have the authority from Congress to do that, so it just pretended that it did. And, as I talked about in my written testimony, Representative Teno Roncalio, at an oversight hearing just like this one in 1978, said to the equivalent of Assistant Secretary Washburn, "What is the authority?" And the answer was that, well, there are these two statutes that Congress passed back in the 1840s—the 1840s—that give us this authority to invent new tribes.

So, Mr. Chairman, in closing, the purposeful violation by an executive branch agency of the constitutional doctrine of separation of powers is a serious matter. And it is serious enough that, whether or not you want to take what I have just given to you as the gospel or not, it is serious enough that you should make an independent investigation to come to your own conclusion as to what I have just told you is legally true. Thank you, Mr. Chairman.

[The prepared statement of Mr. Mitchell follows:]

PREPARED STATEMENT OF DONALD CRAIG MITCHELL, ATTORNEY AT LAW, ANCHORAGE, ALASKA

Mr. Chairman, members of the subcommittee, my name is Donald Craig Mitchell. I am an attorney in Anchorage, Alaska, who has been involved with Native American legal and policy issues from 1974 to the present day in Alaska, on Capitol Hill, inside the U.S. Department of the Interior, and in the Federal courts.

From 1977 to 1993 I served, first as Washington, DC counsel, and then as general counsel for the Alaska Federation of Natives, the statewide organization Alaska Natives organized in 1967 to urge Congress to settle Alaska Native land claims by enacting the Alaska Native Claims Settlement Act (ANCSA). From 1984 to 1986 I was counsel to the Governor of Alaska's Task Force on Federal-State-Tribal Relations. In 1997 I was retained by Alaska Senator Ted Stevens to represent the Senator before the U.S. Supreme Court during the petition stage in *Alaska v. Native Village of Venetie Tribal Government*, one of the most important Indian law cases involving Alaska that the Court has considered. And from 2000 to 2009 I was a legal advisor to the president of the Alaska Senate and speaker of the Alaska House of Representatives regarding Alaska Native and Native American issues, including the application of the Indian Gaming Regulatory Act in Alaska.

I also have written a two-volume history of the Federal Government's involvement with Alaska's Indian, Eskimo, and Aleut peoples from the Alaska purchase in 1867 to the enactment of ANCSA, *Sold American: The Story of Alaska Natives and Their Land, 1867–1959*, and *Take My Land Take My Life: The Story of Congress's Historic Settlement of Alaska Native Land Claims, 1960–1971*. In 2006 the Alaska Historical Society named *Sold American* and *Take My Land* two of the most important books that have been written about Alaska. And most recently, I have finished writing a book on the history of Indian gaming, which contains a chapter devoted to the tribal recognition issue.

I first testified before the Committee on Interior and Insular Affairs (as the Committee on Natural Resources then was known) in 1977. Over the years since I have testified before this subcommittee and the full committee approximately a dozen times, most recently in 2009, and then again in 2011, when I was invited to discuss *Carcieri v. Salazar*, the 2009 decision of the U.S. Supreme Court in which the Court construed the intent of the 73d Congress embodied in section 19 of the Indian Reorganization Act of 1934.

I appreciate having been invited again to discuss tribal recognition generally, as well as the proposed amendments to 25 C.F.R. 83.1 *et seq.* that Assistant Secretary of the Interior for Indian Affairs Kevin Washburn published in the Federal Register on May 29, 2014.

With respect to those subjects I would like to make five points.

1. Since 1977 When the American Indian Policy Review Commission Recommended That Congress "Recognize All Indian Tribes as Eligible for the Benefits and Protections of General Indian Legislation and Policy" Congress Has Not Addressed the Question of Whether, as a Matter of National Policy, Congress Should Create New "Federally Recognized Tribes," and, If It Should, What Standards Congress Should Employ to Decide Whether to Do So in a Particular Case.

The U.S. Supreme Court repeatedly has instructed that the Indian Commerce Clause in the U.S. Constitution grants Congress—*not* the President, and *certainly not* the Assistant Secretary of the Interior for Indian Affairs—"plenary and *exclusive* power over Indian affairs." (emphasis added). And throughout the 19th century Congress exercised its Indian Commerce Clause power to achieve a facinorous objective: the clearing of the public domain of the Native Americans who occupied it.

On the recommendation of President Andrew Jackson, in 1830 Congress authorized the President to persuade Native Americans who occupied land east of the Mississippi River to agree to "voluntarily" relocate to land west of the river. Then beginning around 1850 Congress' policy was to persuade Native Americans who occupied land west of the Mississippi River to agree—again "voluntarily"—to be sequestered on reservations that were withdrawn from the public domain for their occupation. And when the members of a particular ethnological tribe refused to agree to be sequestered, they were compelled by force of arms to settle on the reservation to which they had been assigned. According to historian Robert Utley: "Virtually every major war of the two decades after Appomattox was fought to force Indians on to newly created reservations or to make them go back to reservations from which they had fled."

By 1890 the public domain had been cleared and the objective of Congress' Indian policy became the assimilation of the Native Americans on reservations who had served the clearing (and Native Americans in California and other locations who had not been sequestered on reservations) into the economy and society of the Nation in which the reservations were located. To that end, in 1887 Congress enacted the General Allotment Act, which authorized the President to subdivide land within a reservation into allotments whose restricted titles were conveyed to heads of families, single persons both over and under 18 years of age, and orphan children. And in 1934 the 73d Congress enacted the Indian Reorganization Act (IRA).

In 2011 when he testified before this subcommittee on behalf of the Department of the Interior in support of H.R. 1234, a bill whose enactment would have reversed the *Carcieri v. Salazar* decision, Principal Deputy Assistant Secretary of the Interior for Indian Affairs Donald "Del" Laverdure represented to the subcommittee that the 73d Congress enacted the IRA "to halt the Federal policy of Allotment *and Assimilation"* (emphasis added).

However, that statement is historically incorrect.

The Senate and House Committees on Indian Affairs whose members wrote the statutory text that the 73d Congress enacted as the IRA published the transcripts of their hearings and mark-up sessions. Those transcripts indicate that, to the man and single woman, the members of both committees were committed to assimilation as the objective of Congress' Indian policy and that they agreed "to halt the Federal policy of Allotment" because they were convinced by Commissioner of Indian Affairs John Collier that the allotment of reservations had failed to advance the achievement of the assimilation objective.

To cite two of many examples:

First, section 13(b) of Title I of the original bill Commissioner Collier sent to the 73d Congress defined the term "Indian" as all "persons of one fourth or more Indian blood." When, after they rejected the Commissioner's bill, the members of the Senate Committee on Indian Affairs wrote their own bill, Montana Senator Burton Wheeler, the chairman of the committee, amended the "Indian" definition to increase the blood quantum requirement to "one-half or more Indian blood" because, as Chairman Wheeler explained to the other members, "What we are trying to do is to get rid of the Indian problem rather than add to it." Senator Wheeler's amendment was, and today remains, codified in section 19 of the IRA.

Second, after the 73d Congress enacted the IRA, when Senator Wheeler and other members of the Senate Committee on Indian Affairs realized that Commissioner Collier and the Bureau of Indian Affairs (BIA) bureaucracy were implementing the statute in a manner that contravened the achievement of Congress' assimilationist

policy, they spent the next 12 years attempting (unsuccessfully) to repeal their own bill because, as the members of the committee explained in 1944,

> *after 10 years of operation under the so-called Wheeler-Howard Act, we do not find a single instance in which Indians, under and through that act, have attained a greater degree of self-determination . . . The Indian Bureau has directly controlled the tribal government of every Indian tribe for the past 10 years . . . It has purchased into Federal trust status with tribal and Federal funds, large parcels of expensive lands, which it attempts to manage for the Indian groups and, through such enterprises, to control their whole economy.*

S. Rep. No. 78–1031, at 7 (1944).

In 1946 the Senate Committee on Indian Affairs held its final hearing on a bill whose enactment would have repealed the IRA. Six years later, in 1953 the 83d Congress, without a single dissenting vote, passed House Concurrent Resolution No. 108—the so-called "termination resolution"—which reaffirmed that it was "the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship."

The history of Congress' consistent Indian policy set out above is relevant to this subcommittee's consideration of the tribal recognition issue in the present day because it is evidence that into the 1970s Congress had no interest in creating new "federally recognized tribes" by enacting statutes that would confer that legal status on new groups composed of individuals of varying degrees of Native American descent who did not reside within the boundaries of an existing reservation.

However, in 1972 that situation changed.

In 1994 when he appeared before this subcommittee to discuss the tribal recognition issue, Senator John McCain observed that, to that date, Congress' creation of new "federally recognized tribes" had involved "little or no application of objective standards or criteria" and had relied "almost exclusively on the political strength of the congressional delegation of the state in which the Indian tribe happens to be located."

That, beginning in 1968, was the situation in Arizona.

The San Carlos Apache Tribe is a federally recognized tribe whose members live on the San Carlos Apache Reservation in southeastern Arizona. In 1889 several families whose members were members of the San Carlos Apache Tribe left the San Carlos Apache Reservation and established an encampment on the East Verde River 6 miles north of Payson, a ranching and mining town west of the reservation. By 1968, 64 individuals who were descendants of members of the families that left the San Carlos Apache Reservation in 1889 were living near Payson squatting on land in the Tonto National Forest.

To provide those individuals a location at which to build a permanent community, in 1968 Representative Sam Steiger, whose congressional district included Payson, introduced a bill whose enactment by Congress would authorize the "Payson Band of Yavapai-Apache Indians" to select 85 acres of land in the forest as a site for a village. The bill also "recognized" the Band "as a tribe of Indians within the purview of the [IRA]."

In 1971 when the House Committee on Interior and Insular Affairs reported Representative Steiger's bill, before it did so the committee rewrote the bill to remove the Band's "recognition" as a federally recognized tribe because the Department of the Interior had informed the committee that "we do not now recognize this group and believe that we should not now recognize them. If this group wishes to avail itself of Indian services, they need only to remove themselves to the San Carlos Indian Reservation, which they have refused to do for a number of reasons." *See* H.R. Rep. No. 92–635 (1971).

In the end, because they apparently wanted to ensure that the members of the Payson Band could receive services from the BIA and the Indian Health Service without having to move to the San Carlos Apache Reservation, the members of the Conference Committee who wrote the version of Representative Steiger's bill that Congress enacted into law (and whose membership, in addition to Representative Steiger, included Arizona Senator Paul Fannin) designated the members of the Band—which later was renamed the Tonto Apache Tribe—as a federally recognized tribe. *See* Pub. L. No. 92–470 (1972).

Over the succeeding 40-plus years Congress has enacted other statutes that have designated groups composed of individuals of purported Native American descent as "federally recognized tribes." *See e.g.*, Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98–134 (1983); Auburn Indian Restoration Act, Title II, Pub. L. No. 103–434 (1994); Paskenta Band Restoration Act, Title III, Pub. L. No. 103–454 (1994); Graton Rancheria Restoration Act, Title XIV, Pub. L. No. 106–568 (2000).

In most, if not all, of those cases, Congress enacted those statutes without recorded votes and only because, as Senator McCain noted, "the congressional delegation of the state in which the Indian tribe happens to be located" had decided they wanted Congress to create their particular "federally recognized tribe."

To cite what is perhaps the best known example: In 1983 President Ronald Reagan vetoed the Mashantucket Pequot Indian Claims Settlement Act. The President did so because the Department of the Interior objected to Congress designating the group of individuals who called themselves the Mashantucket Pequot Tribe as a "federally recognized tribe," among other reasons because, as William Coldiron, the Solicitor of the Department of the Interior, explained to this committee: "We don't even know that they are Indians."

Nevertheless, in the end, President Reagan relented because Connecticut Senators Lowell Weicker and Christopher Dodd and all six members of Connecticut's congressional delegation wanted the Mashantucket Pequot Indian Claims Settlement Act enacted into law.

In a similar regard, it merits mention that on March 18 the members of the Senate Committee on Indian Affairs voted to report S. 465, which, if passed by the 114th Congress and signed into law by President Obama, will create six new "federally recognized tribes" in Virginia. The members did so over the opposition of Senator John Barrasso, the chairman of the committee. But S. 465 was reported because Virginia Senators Tim Kaine and Mark Warner, who had introduced S. 465, wanted the bill reported.

In summary, since 1972 Congress has created new "federally recognized tribes" by enacting statutes *ad hoc* and, as Senator McCain noted, with "little or no application of objective standards or criteria" and based "almost exclusively on the political strength of the congressional delegation of the state in which the Indian tribe happens to be located."

Because, as discussed below, Congress' creation of new "federally recognized tribes" has significant policy and budgetary consequences, the subcommittee should consider holding hearings to obtain information about issues like sovereign immunity and other policy consequences and about the budgetary consequences. And after obtaining that information the subcommittee should develop a coherent, objective, and comprehensive policy pursuant to which the subcommittee will evaluate bills whose enactments would create new "federally recognized tribes."

2. Congress Has Not Delegated the Secretary of the Interior Authority to Create New "Federally Recognized Tribes" in Congress' Stead. As a Consequence, the Regulations the Secretary Promulgated in 1978, and Amended in 1994, in Which he Gave Himself That Authority Were and Are *Ultra Vires*.

In 1975 Congress created an 11-member American Indian Policy Review Commission (AIPRC) that South Dakota Senator James Abourezk and Washington Representative Lloyd Meeds, who at the time was the chairman of this subcommittee, co-chaired, and on which the present chairman of this subcommittee served. The resolution that created it directed the AIPRC to "conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revision in the formulation of policies and programs for the benefit of Indians."

After conducting its review, in 1977 the AIPRC submitted a report to Congress. In chapter 11 the report lamented that "There are more than 400 tribes within the Nation's boundaries and the Bureau of Indian Affairs services only 289. In excess of 100,000 Indians, members of 'unrecognized' tribes, are excluded from the protection and privileges of the Federal-Indian relationship." To remedy that situation, the report recommended that *Congress* adopt "a statement of policy affirming its intention to recognize all Indian tribes as eligible for the benefits and protections of general Indian legislation and Indian policy," and that *Congress "by legislation* create a special office . . . independent from the present Bureau of Indian Affairs, entrusted with the responsibility of affirming tribes' relationships with the Federal Government and empowered to direct Federal-Indian programs to these tribal communities." (emphasis added).

Those recommendations were consistent with the Indian Commerce Clause, which grants *Congress*—and not the executive branch—"plenary and exclusive power over Indian affairs." They also were consistent with the attached 1975 letter in which the chief of the BIA Branch of Tribal Relations states: "[F]ormer Secretary [of the Interior Rogers] Morton and Solicitor Kent Frizzell were not sufficiently convinced that the Secretary of the Interior does in fact have legal authority to extend recognition to Indian tribes absent clear Congressional action."

To implement the recommendations in the AIPRC report regarding the creation of new "federally recognized tribes", in 1977 Senator Abourezk introduced S. 2375. The bill established a "special investigative office" inside the Department of the Interior to "review all petitions for acknowledgment of tribal existence presently pending before the Bureau of Indian Affairs." The bill also delegated the Secretary of the Interior authority to "designate [a petitioning] group as a federally acknowledged Indian tribe."

In 1978 Representative Charles Rose introduced S. 2375 in the House as H.R. 11630 and H.R. 13773.

A year earlier and a month after the AIPRC issued its report, on June 16, 1977 the BIA published a proposed rule that contained regulations whose promulgation as a final rule would delegate the Commissioner of Indian Affairs authority to "determine that an Indian group is a federally recognized tribe." *See* 42 Federal Register 30,647 (1977). On June 1, 1978 the BIA published a revised version of its proposed rule that contained regulations whose promulgation as a final rule would delegate the Assistant Secretary of the Interior for Indian Affairs that authority. *See* 43 Federal Register 23,743 (1978).

Two months after the BIA's publication of its revised proposed rule, on August 10, 1978 the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs held a hearing on H.R. 13773.

One of the witnesses was Deputy Assistant Secretary of the Interior for Indian Affairs Rick Lavis who informed the subcommittee that the Department of the Interior opposed H.R. 13733 because "We believe the existing structure in the Bureau of Indian Affairs is competent and capable of carrying this [i.e., the task of tribal recognition] out." When Representative Teno Roncalio, the chairman of the subcommittee, asked, "You feel that you can make recognition for the tribes without statutory requirement of Congress?", Secretary Lavis answered: "We are operating on the assumption that the statutory authority already exists."

When Chairman Roncalio then asked for a "quick citation" of that statutory authority, Secretary Lavis deferred to Scott Keep, an Assistant Solicitor, who responded: "Mr. Chairman, it is from a general interpretation of the various laws including the *Passamoquoddy* case [1] and also the Indian Reorganization Act and the way that has been implemented." Mr. Keep also informed the Chairman that "The Department also takes the position that sections such as 25 United States Code, sections 2 and 9, giving the Secretary and the Commissioner of Indian Affairs responsibility for Indian affairs gives him the authority to determine who is encompassed in that category."

Two weeks after the hearing, on August 24, 1978 the BIA promulgated its proposed regulations as a final rule.

As Assistant Solicitor Keep had predicted, the final rule identified 5 U.S.C. 301 and 25 U.S.C. 2 and 9 as the statutes in which the BIA believed that Congress had delegated the BIA authority to promulgate regulations in which the Assistant Secretary of the Interior for Indian Affairs granted himself the authority to create new "federally recognized tribes" unilaterally by final agency action. *See* 43 Federal Register 39,362 (1978).

But the texts of those statutes indicate that Congress intended their enactments to delegate the Assistant Secretary no such authority.

The U.S. Supreme Court has instructed that, while Congress may enact a statute in which it delegates a portion of its legislative power to the executive branch, the constitutional doctrine of separation of powers requires that the text of the statute contain an "intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform" and that a statute that delegates legislative authority is invalid if its text contains "an absence of standards for the

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[1] *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975). In *Passamaquoddy* the District Court held that Congress intended the word "tribe" in the Nonintercourse Act of 1793 to mean tribe in its ethnological sense, rather than tribe in its political sense. Contrary to Assistant Solicitor Keep's assertion, that holding has nothing to do with the question of whether prior to 1977 Congress had enacted a statute that delegated the Secretary of the Interior authority to create new federally recognized tribes in Congress' stead.

guidance of [Executive Branch action], so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed." *See J.W. Hampton, Jr. & Company v. United States*, 276 U.S. 394, 409 (1928); *Yakus v. United States*, 321 U.S. 414, 426 (1944). *And see also Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986) (reiterating that "[a]n agency may not confer power on itself").

The texts of 5 U.S.C. 301 and 25 U.S.C. 2 and 9 not only do not contain any intelligible principles or identifiable standards to guide the Assistant Secretary's decisionmaking regarding his creation of new "federally recognized tribes," the texts cannot fairly be read to delegate the Assistant Secretary *any* authority to create new tribes. Because they do not, the regulations the BIA promulgated in 1978, the amendments to those regulations it promulgated in 1994, and, if they are published in a final rule, the new amendments the BIA published in the Federal Register on May 29, 2014 as a proposed rule were and are *ultra vires*.

5 U.S.C. 301

5 U.S.C. 301 states: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." On its face that statutory text contains no delegation of authority to create new "federally recognized tribes," and, if *arguendo* it does, the text contains no standards to guide the exercise of that authority.

25 U.S.C. 2

Congress enacted 25 U.S.C. 2 *172 years ago. See* ch. 174, sec. 1, 4 Stat. 564 (1832). As now codified, the text of the statute reads: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." If *arguendo* in 1832 Congress intended that text to delegate the Commissioner legislative authority to create new "federally recognized tribes" in Congress' stead, the text contains no standards to guide the exercise of that authority.

25 U.S.C. 9

Congress enacted 25 U.S.C. 9 *170 years ago. See* ch. 162, sec. 17, 4 Stat. 738 (1834). As now codified, the text of the statute reads: "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." If *arguendo* in 1834 Congress intended that text to delegate the President legislative authority to create new federally recognized tribes in Congress' stead, the text contains no standards to guide the exercise of that authority. In addition, the text of the statute only grants the President legislative authority to prescribe regulations to carry into effect the provisions of an "act relating to Indian affairs." What was the act relating to Indian affairs that the promulgation of the regulations in 1978 carried into effect? There was no such act.

43 U.S.C. 1457

In 1994 when the BIA amended the regulations it promulgated in 1978 it added 43 U.S.C. 1457 to the list of statutes it believes delegates the BIA authority to promulgate the regulations. *See* 59 Federal Register 9293 (1994). But the text of 43 U.S.C. 1457 simply charges the Secretary of the Interior with responsibility for "the supervision of public business relating to" 13 different subject areas, one of which is "Indians." That is the sum of the statute. Nothing in the text of 43 U.S.C. 1457 delegates to the Secretary authority to create new federally recognized tribes. And if *arguendo* Congress did intend 43 U.S.C. 1457 to delegate the Secretary that authority, the text contains no standards to guide the exercise of that authority.

25 U.S.C. 479a–1

On May 29, 2014 when the BIA published its most recent proposed rule, which, if published as a final rule will amend 25 C.F.R. 83.1 *et seq.*, the regulations it promulgated in 1978 and amended in 1994, it added 25 U.S.C. 479a–1 to the list of statutes it believes delegates the BIA authority to promulgate the regulations. 25 U.S.C. 479a–1 is section 104 of the Federally Recognized Tribe List Act (FRITLA), which Congress enacted in 1994. The text of the statute reads: "The Secretary [of the Interior] shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

Nothing in that statutory text delegates the Secretary new authority to create new federally recognized tribes. And Congress intended no such result. The text of the FRITLA was written, and then was reported as an amendment in the nature of a substitute for the original text of H.R. 4180, by this committee. When it reported its amendment, the committee informed the House (and the BIA) that "If enacted, H.R. 4180 would make no changes in existing law." See H.R. Rep. No. 103–781, at 6 (1994). So why the BIA now would represent that this committee intended Congress' enactment of 25 U.S.C. 479a–1 to delegate the Secretary new authority to create new federally recognized tribes is inexplicable.

3. In 1994 the BIA amended the Regulations It Promulgated in 1978 in Order to Make It Easier for the Assistant Secretary of the Interior for Indian Affairs to Designate a Group Composed of Individuals of Native American Descent as a "Federally Recognized Tribe."

25 C.F.R. 54.7 (1978) required a petition filed by an "Indian group" to establish that the group had satisfied seven eligibility criteria. One of the most important was that the petition demonstrate that a "substantial portion" of the group's membership "inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that its members are descendants of an Indian tribe which historically inhabited a specific area." *See* 25 C.F.R. 54.7(b) (1978).

In 1994 when the BIA amended its regulations, after designating 25 C.F.R. 54.7(b) (1978) as 25 C.F.R. 83.7(b) (1994), it rewrote that eligibility criterion to state that a petition now need demonstrate only that "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present." The regulations then defined the term "community" to mean "any group of people which can demonstrate that consistent interactions and significant social relationships exist within its membership and that its members are differentiated from and identified as distinct from nonmembers." *See* 25 C.F.R. 83.1 (1994).

In its final rule the BIA explained the purpose of that change as follows: "The old definition implied a geographic community, while the revised one focuses on the social character of the community." *See* 59 Federal Register 9287 (1994). In other words, a "federally recognized tribe" henceforth could be a social club whose members live scattered in towns and cities across a state, and indeed throughout the Nation.

For example, in 2000 Assistant Secretary of the Interior for Indian Affairs Kevin Gover granted a petition that a group that calls itself the Cowlitz Indian Tribe had filed and designated the group as a federally recognized tribe. *See* 65 Federal Register 8436 (2000).

Today, the headquarters of the Cowlitz Indian Tribe is located in an office building in Longview, Washington, a town on the Interstate 5 freeway 48 miles north of Portland, Oregon. In 1995 when a BIA anthropologist investigated the Cowlitz Indian Tribe, the anthropologist discovered that 1,030 of the group's 1,577 members lived in 133 different towns and cities throughout the state of Washington, 184 members lived in Oregon, 120 members lived in California, and that the group's 483 other members lived in 34 other states as far south as Alabama and Florida and as far east as New Jersey, New York, and Connecticut. If in 1994 the BIA had not rewritten 25 C.F.R. 54.7(b) (1978) to remove the eligibility criterion that required a "substantial portion" of the members of a group to "inhabit a specific area" that diaspora would have been disqualifying.

4. If They Are Promulgated in a Final Rule, the Changes to the Eligibility Criteria in 25 C.F.R. 83.7 (1994) That the BIA Has Proposed in the Proposed Rule It Published in the Federal Register on May 29, 2014 Will Further Loosen the Eligibility Criteria and, as a Consequence, Will Increase the Number of Petitions the Assistant Secretary of the Interior Will Grant in the Future.

For example:

25 C.F.R. 83.7(a) (1994) requires a group to demonstrate that it "has been identified as an American Indian entity on a *substantially continuous basis* since 1900." (emphasis added). Proposed 25 C.F.R. 83.11(a) (2014) requires a group to "describe its existence as an Indian tribe, band, nation, pueblo, village, or community *at any point in time* during the historical period." (emphasis added). And proposed 25 C.F.R. 83.1 (2014) defines "historical" to mean "1900 or earlier."

25 C.F.R. 83.7(b) (1994) requires a group to demonstrate that "a predominant portion of the petitioning group comprises a distinct community and has existed as a

community *from historical times until the present*." (emphasis added). Proposed 25 C.F.R. 83.11(b) (2014) requires a group to "demonstrate that it existed as a distinct community *from 1934 until the present* without *substantial* interruption." (emphases added).

25 C.F.R. 83.7(c) (1994) requires a group to demonstrate that it "maintained political influence or authority *over its members* as an autonomous entity *from historical times until the present*." (emphasis added). Proposed 25 C.F.R. 83.11(c) (2014) requires a group to demonstrate that it "maintained political influence or authority *from 1934 until the present* without *substantial* interruption." (emphases added). Note: a group no longer will need to demonstrate that it maintained political influence or authority "over its members."

25 C.F.R. 83.7(e) (1994) requires a group to demonstrate that its "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." Proposed 25 C.F.R. 83.11(e) (2014) requires a group to demonstrate that "at least *80 percent* of [its] membership . . . consist[s] of individuals who can demonstrate that they descend from a tribe that existed in historical times or tribes that combined and functioned in historical times." (emphasis added). Note: a group no longer will need to demonstrate that combined tribes functioned "as a single autonomous political entity."

5. The Creation of New "Federally Recognized Tribes" Has Significant Policy and Budgetary Consequences.

It is reasonable to assume that, because it is proposing to loosen the eligibility criteria in 25 C.F.R. 83.7 (1994), the BIA believes that the creation of additional new "federally recognized tribes" should be encouraged. But the creation—either by Congress or by the Assistant Secretary of the Interior for Indian Affairs—of a new federally recognized tribe has significant policy and budgetary consequences of which Congress should be aware. Two of the most important are:

Sovereign Immunity

Decades ago the U.S. Supreme Court decided that every "federally recognized tribe" has sovereign immunity that it may invoke to prevent the tribe and its businesses and employees from being sued without the tribe's consent in both the Federal and the state courts.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, a decision the U.S. Supreme Court issued in 1998, after noting that it was the Court, rather than Congress, that invented the rule that federally recognized tribes have sovereign immunity and that the Court had done so "almost by accident," three dissenting justices condemned the rule as "unjust," and pondered why federally recognized tribes should "enjoy broader immunity than the states, the Federal Government, and foreign nations?" While the six other justices decided that the doctrine of *stare decisis* required the Court to continue to adhere to the rule, they settled on that result begrudgingly and only after noting that "There are reasons to doubt the wisdom of perpetuating the doctrine," and that those reasons "might suggest a need to abrogate tribal immunity, at least as an overarching rule." Despite their misgivings, in the end those justices decided that, rather than the Court abrogating tribal immunity as an overarching rule, the Court should "defer to the role Congress may wish to exercise in this important judgment."

But since the *Kiowa Tribe* decision, this committee and the Senate Committee on Indian Affairs have expressed no interest in investigating whether, in the second decade of the 21st century, it is appropriate to allow a federally recognized tribe to invoke sovereign immunity. While sovereign immunity is a subject that is beyond the scope of this hearing, the subcommittee should be aware that sovereign immunity is implicated each time a new federally recognized tribe is created.

Who Is, or Should Be, an "Indian"?

As noted above, in 1934 Congress decided that an individual is an "Indian" for the purposes of the IRA only if he or she is "of one-half or more Indian blood." And in 1971 Congress decided that an individual is an "Alaska Native" for the purposes of the Alaska Native Claims Settlement Act only if he or she is "of one-fourth degree or more Alaska Indian, Eskimo, or Aleut blood, or combination thereof." But in 1978 the BIA decided that a group should be eligible to petition the Assistant Secretary of the Interior for Indian Affairs to designate the group as a new "federally recognized tribe" as long as the group is composed of individuals who each have *any* percentage of Native American blood quantum because they each have an ancestor who was a member of "a tribe which existed historically or from historical tribes which

combined and functioned as a single autonomous entity." *See* 25 C.F.R. 54.7(c) (1978).

In 1994 when it amended the regulations it promulgated in 1978, the BIA maintained its "any percentage of Native American blood quantum" standard. *See* 25 C.F.R. 83(e) (1994). However, in the amendments to its regulations that it published in the Federal Register on May 29, 2014 as a proposed rule the BIA proposed that a group should be eligible to petition the Assistant Secretary of the Interior for Indian Affairs to designate the group as a new "federally recognized tribe" even if up to 20 percent of the individuals who are members of the group do not have any Native American blood quantum whatsoever. *See* 25 C.F.R. 83.11(e) (2014).

As a matter of policy, is it appropriate for a group to be designated as a new "federally recognized tribe" because the individuals who are members of the group each had single great or great-great or great-great-great grandparent who was a Native American? What the answer to that question should be is a policy decision for the Congress that is beyond the scope of this hearing, other than to note that the question is implicated each time a new federally recognized tribe is created.

However, the policy concern Oklahoma Senator Don Nickles expressed about the BIA's tribal recognition process in 1993 during the confirmation hearing of Bruce Babbitt to be Secretary of the Interior merits the subcommittee's consideration. At the time Senator Nickles was a member of both the Senate Committee on Indian Affairs and the Senate Committee on Appropriations, where he served as Ranking Member of the Subcommittee on Interior and Related Agencies. Senator Nickles advised Secretary-Designate Babbitt that

> *I also think you need to look at blood quantums, because you are going to find that as you visit [IHS] hospitals and others, that we do not have blood quantum requirements. And the net result is two generations from now you are going to have individuals that are 1/132 that are going to be demanding full health care benefits for the remainder of their lives, and it is going to be enormously expensive. It is an open-ended full expense entitlement. So, keep that in mind. It is a growing, expanding, building base. The Indian population has exploded. And one of the reasons is because there is not a qualification for or a requirement on quantum.*

In conclusion, Mr. Chairman, insofar as the BIA's creation of new "federally recognized tribes" is concerned, since 1978 the BIA has maintained that that is a quasi-private matter that concerns only the BIA and the groups that have filed petitions that request recognition. However, as I noted at the outset, the Indian Commerce Clause in the U.S. Constitution grants Congress—and not the BIA—plenary and exclusive power over Indian affairs. And because it does, it is past time for Congress to reassume control of the tribal recognition process.

Attachment:

December 18, 1975 Letter from U.S. Department of the Interior, Bureau of Indian Affairs to Huron Potawatomi Athens Indian Reservation

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D. C. 20245

IN REPLY REFER TO:
Tribal Government Services

DEC 18 1975

Mr. David Mackety
Huron Potawatomi Athens Indian
Reservation
Fulton, Michigan 49052

Dear Mr. Mackety:

This will acknowledge receipt of your letter of November 12 concerning a petition for Federal recognition of the Huron Band of Potawatomi Indians.

While the first page of your letter appears to be part of your original letter, the second page is a reproduction and the petition you referred to was not included. Notwithstanding these facts, former Secretary Morton and Solicitor Kent Frizzell were not sufficiently convinced that the Secretary of the Interior does in fact have legal authority to extend recognition to Indian tribes absent clear Congressional action. Nor, even if such authority can be said to exist, does the law appear to be clear as to the applicable standards and procedures for recognition. In short, they felt that the "recognition" concept is an exceedingly indefinite one. As a result attorneys in the Solicitor's office researched various questions connected with recognition and prepared detailed memoranda. That memoranda is now being reviewed.

Until that review is concluded and the future policy relating to administrative recognition of Indians tribes or bands has been determined, we will be unable to act upon the petition of the Huron Band of Potawatomi Indians. If you will send the petition forward, however, we will be happy to hold it in our files for immediate action following the determination of future policy.

Sincerely yours,

Chief, Branch of Tribal Realtions

CONSERVE AMERICA'S ENERGY

Mr. YOUNG. I appreciate it. It is customary—I may break my custom just a little bit, because the Full Chairman is looking at his iPod, ignoring me.

[Laughter.]

Mr. YOUNG. Mr. Chairman, do you have any questions? As a courtesy, I am asking you, the Chairman of the Full Committee. Do you have any questions you would like to ask the witnesses?

Mr. BISHOP. I do, Mr. Chairman. I would actually feel more comfortable waiting my turn, but if you want me to——

Mr. YOUNG. No, I don't, really.

[Laughter.]

Mr. YOUNG. Do you want to go ahead, or not?

Mr. BISHOP. All right, let me just ask one to Secretary Washburn, if I could. I appreciate listening to the testimony that was here.

Chairman Young noted that, I think it was on March 26 of this year, there was a bipartisan letter that was sent to Interior from this committee. It was also signed by Mr. Courtney and Ms. Esty, and I think Mr. Thompson, as well. It expressed our concern with the proposed revision, especially to Part 83, and urged the Department to—if I quote right—"refrain from issuing final regulations until we have conducted the oversight necessary to evaluate thoroughly the issues associated with recognition."

Despite the bipartisan concerns that this proposed revision will pose a direct threat to the integrity of the tribal recognition process and the unique stature of tribes, within 48 hours we find the Department had already sent the rule over to OMB for final approval.

So, I guess the two questions. The first one is, Mr. Assistant Secretary, are the concerns that we presented to you not important? You know, I don't have a lot of time. I think that can be yes or no. Are our concerns not important to you?

Mr. WASHBURN. Chairman, that is not fair. Of course your concerns are important.

Mr. BISHOP. All right. Then the question for the second one is—I am not going to ask you why you failed to respond to those concerns before submitting the revisions to OMB, but I will ask you, will you commit to pull back Part 83 revisions you submitted to OMB, so that we can conduct the appropriate oversight and address the concerns held by this committee and others?

Mr. WASHBURN. Chairman, we have been criticized for moving too slow, and you are asking us to stop, in essence. And we have been working on this for 2 years. So, respectfully, I won't commit to doing that.

Mr. BISHOP. You won't pull it back, even though we responded to you, recognizing full well that we are talking about a legislative function here, not an executive function. You will not commit to pulling those back until we do the proper oversight on that. That is what you just told me.

Mr. WASHBURN. Chairman, I have a stack of letters also saying, "You've got to get this done." We need reform in this area. And there are five people that signed your letter, and you are Chairman of a very important committee, as is Chairman Young. But we have been working this process a very long time. And this very subcommittee has held numerous oversight hearings over the last four or five or six or seven Congresses on this issue.

So, there has been a lot of oversight. And, in fact, that is where we got a lot of our ideas, past bills that have passed out of this

committee. Those were some of the ideas that we used to craft our proposals. So there has been an enormous amount of effort, and we are going to try to get this done.

We believe that a lot of the issues that have been raised here today have been addressed and will satisfy folks in the final rule. Not all of them, but some of them certainly have been addressed. And it is a difficult compromise, because we have people all over the political map on this. But my job is to do what I think is right, and I think we have reached that.

Mr. BISHOP. You earlier said that no good deed or work goes unpunished. I am still waiting for the good deed or the good work. And, sir, I am not concerned with the speed or the number that you have. I am concerned that we do it the right way. I insist that we do it the right way. One way or another, we are going to push you until we do it the right way. And, whether that is quick or not, I don't care. But it must be the right way.

I will yield back, Mr. Chairman.

Mr. WASHBURN. I share that commitment, Chairman.

Mr. YOUNG. I thank——

Mr. BISHOP. Wait. If you share it, are you going to pull it back, then?

Mr. WASHBURN. I share the commitment to doing it the right way. And I promise you that I will do it the right way, as I see best. I have been given a——

Mr. BISHOP. So you are going to pull it back.

Mr. WASHBURN. I don't plan to pull it back.

Mr. BISHOP. Then we didn't do it the right way. Thank you.

Mr. YOUNG. Thank the Chairman, and I appreciate it. And now we will recognize the Ranking Member, as is customary—go ahead.

Dr. RUIZ. Thank you so much, Mr. Chairman. And thank you, Chairman Bishop, for being here today. I look forward to working with the both of you this cycle closely, and making sure we do this the right way.

Mr. Washburn, this proposed rule has been called a clarification of existing practices within BIA related to what standards are necessary for recognition. Earlier you talked about making sure that we maintain its rigor, and we talked about the threat of lowering the bar.

So, can you tell me whether or not it is BIA's current practice to consider evidence from 1934 as being sufficient historical evidence of tribal existence and community?

Mr. WASHBURN. No. Under the current rule, the unreformed rule, no, 1934 is not the date when that begins.

Dr. RUIZ. OK. So then, if this is not BIA's current practice, then are you not, in effect, lowering the bar from recognition by changing that date?

Mr. WASHBURN. Well, you are quoting from a proposed rule, a proposed rule that we now have had hundreds of comments on. So, we have heard a lot of comments about that date of 1934. Incidentally, we pulled that date of 1934 from legislation that passed this committee in a previous Congress. That will teach me to listen to you guys.

We have looked carefully at that date. We have looked at other dates. Some people said it should be 1877. Some people said it——

Dr. RUIZ. Well, what is the point—the trust responsibility that we have for sovereign nations prior to the establishment of our country is to respect those nations that we have the responsibility for. So how will you determine—and I know that this is the process, but isn't the date and the continuity of evidence based on the original first Americans?

Mr. WASHBURN. Well, it is. It is just a matter of how many years do you think they need to show their existence and their continuity. And 1934 is a date that would show eight decades of continuity. It wouldn't be someone that sprung from whole cloth yesterday. That would be 81 years.

If we went back to 1915, that would be a century. And we currently go back to, in essence, 1789 for some tribes, as Senator Blumenthal recognized. But we didn't hardly have—California wasn't even part of the United States in 1789. So the date has to be necessarily somewhat flexible. And we have been trying to figure out what would be the right date, so that we get the rigor that we need, but not impose undue responsibilities.

One last thing on that. We thought 1934 to the present was an adequate time period because we have never had a tribe that has passed through the process—or, indeed, has failed the process—that could show that it existed since 1934, but couldn't show existence prior to that. So the 1934 to the present was a pretty good proxy for all of history, it turns out. But it is very expensive to go back before 1934. It is very expensive. It requires thousands of dollars worth of historians to do that work.

So, we are trying to lower the cost, but maintain the rigor. And that is why, in the proposed rule, we suggested the 1934 date. But again, we have heard a lot of comments about that date. And——

Dr. RUIZ. I am going to ask another question. This is for Mr. Cladoosby.

In general, NCAI has been supportive of the proposed rule, but there is a sticking point when it comes to the reconsideration of denied recognitions, the so-called third-party veto, which would allow states and local governments the power to deny the request for reconsideration. I agree with you, that is indeed a dangerous precedent.

So, in your opinion, if it stays in the final rule, would this provision empower states and local governments to press for veto power over tribal affairs, such as water settlements and land into trust?

Mr. CLADOOSBY. Well, the tribes that were previously denied, it is my understanding, Mr. Assistant Secretary, they cannot resubmit only if the denial is because of a third-party intervention and that third party is now willing to support a petition for review. So, you know, that is——

Dr. RUIZ. So, Mr. Washburn, how do you feel that this provision would empower other entities to press for veto power over tribal affairs?

Mr. WASHBURN. Well, what we were trying to do with that notion that became the third-party veto is basically to recognize that the people who have fought recognition also have some equities. They sometimes spent thousands and thousands of dollars to fight recognition. And it was—what they said was, "It is unfair to us, because we have spent tens of thousands, or even hundreds of

thousands of dollars to fight this group, and were successful." And now, if the Department lets them just start over, then they are back at square one, even though they have invested so much money on something they cared deeply about. And that is, ultimately, what that provision was intended to get at, recognize those equities.

Ultimately, what we have heard from a lot of people is that provision may be unconstitutional or illegal. So, we have taken that into consideration, because we certainly want a rule that is defensible in court.

Dr. RUIZ. Sounds like there is a lot of reconsideration going on here. And there is going to be a lot of editing of these proposed rules. And there are going to be some concessions that I am going to really be interested in reviewing, once that becomes transparent. So, I appreciate all of you here. And, Chairman Martin, good to see you today.

Mr. YOUNG. I feel a little bit—I am watching Kevin Washburn right now. He is the only one who has seen this rule. So we are sort of poking in the skunk hole right now, not knowing for sure that it is in there or not. So I do appreciate the testimony. And I saw him grinning a couple times, so I don't know what he is doing, frankly, but we will find out later.

I believe—well, if he came in late, you know—well, I will recognize the Vice Chairman, because it is a lady. Have you got questions you would like to ask now or later?

Mrs. RADEWAGEN. Thank you, Mr. Chairman. I do have questions.

Mr. YOUNG. OK.

Mrs. RADEWAGEN. My question is for Chairman Martin. Do you think it is better for Congress to determine the appropriate standards for tribal recognition than for an unelected Assistant Secretary of the Interior to do it?

Mr. MARTIN. No, I don't. How we look at this is it is a weakening of the standards that have been placed for all the tribes that are recognized today, it is who we are. I talked earlier about it being inherent sovereignty of the tribe. And when groups come in that want to be recognized as a tribe, they haven't been where we are. How did they get where they are? I don't know those answers, or have the answers to those questions. So, no, I don't think it is the Secretary's place, with all due respect.

Mrs. RADEWAGEN. Thank you. Thank you, Mr. Chairman. I yield back.

Mr. YOUNG. Thank you, ma'am.

Mr. Courtney, welcome, by the way. I mean we always like new blood.

[Laughter.]

Mr. COURTNEY. Thank you, Mr. Chairman. I really appreciate the invitation to be here today, and also the fact that you responded to a number of us who requested this hearing. I don't think you needed much persuasion to do it, but as you pointed out in your opening remarks, these rules just have a huge impact that will go on for decades, as we have heard from Mr. Mitchell quoting the prior experience here. So this hearing is, I think, a very important one for our Nation.

I had an opening statement, which I am going to ask to be submitted for the record. And basically, in a nutshell, eastern Connecticut was the place where a number of these applications that Senator Blumenthal referred to earlier—and that he worked for years as the Attorney General. So we have some pretty sort of battle-scarred veterans, in terms of people that went through the process, small towns that, frankly, did not have the budgets to deal with large legal expenses, and certainly didn't have the inherent legal expertise. But they learned fast the hard way, going through this process.

And, as Senator Blumenthal said, I think that many were frustrated by the process, in terms of how opaque it was, the fact that it took a long time, that the Department really didn't help much, in terms of interested parties with just sort of really common-sense assistance, in terms of guidelines, explanations of procedures.

Mr. Washburn, these local leaders have prepared a 12-point list of suggestions which are very mild, and very common sense. Obviously, we are in a different era, technology-wise, in terms of having the Internet and Web sites available for best practices and webinars. So I am going to submit, again, their list of 12 suggestions, both to committee staff and to your office. And I would appreciate a response. They were not incorporated in the proposed regulations. And, frankly, I am not even sure they require regulations. Again, it is really just about the way the Department operates for people who, again, are impacted by applications, and just want to understand better the way that they can weigh in.

But one of the changes that you proposed which, again, I think sort of caught people by surprise was the ability of local communities to participate in this process as full parties with standing. In the case of the Eastern Pequots, which Senator Blumenthal, again, took all the way to a Federal district court judgment, the towns played a critical role in terms of their participation in that litigation.

Looking at your proposed rules, they really are now going to be almost commentators, as opposed to full parties or participants. And I would just ask for your comment because, again, they have to deal with all the issues of land use, of just sort of being a referee, in terms of neighbors dealing with each other. In my opinion, there is nothing—there was hardly any participant that is more justified, in terms of standing. And it seems like we are going backwards, as far as their ability to fulfill that function.

Mr. WASHBURN. Thank you, Mr. Courtney. I wouldn't agree with that at all. We have worked hard to ensure that local governments have a voice. We know that any group that we recognize as a tribe is going to have to have a relationship with their local communities that they work with. And those state and local communities deserve a voice in the process.

And, as you sort of recognized, nowadays it is easier to be more transparent about these things. We sometimes get boxes and boxes, literally tens of linear feet of documents. But nowadays it is possible to put those sorts of things on the Web, and we think those kind of things can make it more transparent, and make it easier for anyone to participate. But certainly cities and local governments.

Mr. COURTNEY. So it is your testimony—just want to make sure I have this clear—that, again, a community like Ledyard, Connecticut, or North Stonington, which, again, the Eastern Pequot petition would have impacted, and who were full participants with lawyers, et cetera, they would continue to have that right to participate in the recognition administrative process?

Mr. WASHBURN. Well, they have a—we will take information from wherever it comes. So, I am not sure I would set them up above others, because tribes also have a right, if there are tribes locally that have an interest in the issue.

There are a lot of people that are interested when we take these kinds of actions, or are considering these kinds of actions. And certainly, yes, neighboring cities are among those groups of people that we believe are interested, and we hope to hear from whenever we are making these kinds of decisions.

Mr. COURTNEY. Thank you. Again, Mr. Chairman, we are obviously going to learn more very soon, and I look forward to working with you and the committee when those rules become——

Mr. YOUNG. I thank the gentleman.

Mr. COURTNEY [continuing]. Public.

Mr. YOUNG. And because you are directly affected, make sure, if you see something that is questionable, contact the committee. Come back and sit any time.

Mr. LaMalfa, you are next.

Mr. LAMALFA. Thank you, Mr. Chairman.

First, Assistant Secretary Washburn, again, going back to your proposed rules, of course I am greatly concerned, as are many on the committee, that this would allow for previously rejected tribes to reapply under new, lower standards if they had not made the cut before.

So there is a specific petition in southern California that we are looking at. The Juaneno Band of Indians in southern California have submitted multiple petitions as far back as 1982. In 2007, the BIA issued an initial negative determination on these petitions, finding the band failed four out of seven key criteria. In 2011, the BIA issued a final negative determination, finding the Juaneno Band still failed four of seven criteria, after having nearly 4 years to try and rectify the problems, get more information, et cetera.

This Band appealed this decision to the Interior Board of Indian Appeals, IBIA. The IBIA denied their appeal again in June 2013, finding it baseless, which would seem like that would be, probably, the end of the process. But in December 2013, you and Secretary Jewell decided against ending the process. Instead, opened the door for having them try again under new, weaker standards in these proposed new rules.

So, what I am trying to figure out, and many of my colleagues here, how can you justify continuing to use limited agency time and taxpayer dollars on the Juaneno Band, when they clearly do not meet the standards? How many second chances are you going to give them?

Mr. WASHBURN. Well, again, this is an issue that we got a lot of feedback on. You will see how we resolved that when the final rule comes out, and I invite oversight on that final rule, because that is this committee's and this Congress's responsibility.

Mr. LAMALFA. May I ask what does "a lot of feedback" mean? I mean where does that come from?

Mr. WASHBURN. We received numerous comments. I mean, we put that proposed rule, that is notice and comment rulemaking. So we put the proposed rule out publicly, and we invited comments. And we received——

Mr. LAMALFA. You measure by volume of comments, or does there have to be some substance to each of the comments from people that have a stake in it, or have a background? Because I can see plenty of comments in a newspaper online article that I don't take very seriously.

Mr. WASHBURN. No, no, no——

Mr. LAMALFA. So, seriously, what is that?

Mr. WASHBURN. We had people that actually wrote us letters that really carefully looked at this, including the people at this table, many—several of the people at this table. And they and their lawyers looked through this and made substantive comments and gave us their very legitimate concerns, again, some of which, in some of the areas we have accepted, and not all of which we have accepted, because there is lots of disagreement.

We found that, on any given issue, there was a range of opinion about how we should handle those. But it was our job to assimilate all those, listen to all those, and then do the best we could, make the right call. So that is one of the areas where we got some of the most comments. So——

Mr. LAMALFA. Are you getting comments that say that this is to the detriment of existing tribes that have met the test at a higher level, and then they are seeing others that would perhaps, if approved under new, more lax rules, how are they supposed to feel about that, about the fairness of that?

Mr. WASHBURN. Well, we certainly received comments like that. And we take those to heart.

Mr. LAMALFA. That is the vast majority of other tribes that would probably make those kinds of comments?

Mr. WASHBURN. Well, honestly, again, we received comments all over the map on that very issue. You know, and I will tell you, the way this came up was we had originally, in the discussion draft, had changes to the criteria. What I am hearing now is it is OK to change the process, but don't change the standards, the criteria.

In the original discussion draft we talked about changing the standards and the criteria, and my view at the time was, well, if we are really just changing the criteria, if someone that had been through the process failed because of a criteria, and we change that criteria later, and they would have succeeded under the new criteria, it was only fair to say if they can prove that, they should be able to go through the process. It seemed only fair. So, that is kind of where the idea of re-petitioning came from.

But again, it has been quite controversial——

Mr. LAMALFA. Well, criteria is really the key element above the process. I mean, if you are qualified to be a brain surgeon because you have been through enough years of schooling, it isn't that, oh, you just went through a process to get a license. You have to have reached the level. The same would be here, that—changing the important aspects of previous history, historical records, what makes

up a community, those are very important cornerstones. And if that is what is being changed, then it is really not right for the tribes that have demonstrated that in the past.

Mr. WASHBURN. Well, you are absolutely right, Mr. LaMalfa. And I would say that there have been advances in brain surgery, though, and we need to recognize advances as well, as we think about how to apply these standards.

But I think you are right. I don't disagree with your fundamental point that these standards are—while not set by Congress—and I would invite Congress to take a look at passing a bill that actually provides standards, because Congress absolutely has plenary authority here, and has the right to do so. If you all give us standards, we will apply those, rather than the ones that we are trying to come up with. This is not an easy task——

Mr. LAMALFA. Part of the task of the committee here today in getting to that, and you kind of nicely told our overall Committee Chairman to pound sand on that a while ago.

Mr. WASHBURN. Well, it is a difficult task, and I am willing to live with what I do. And I expect oversight from you, once we publish a rule. And you can tell me whether you disagree with it, and you can overrule it. You can pass a rule yourself, if you disagree, because I think these are hard questions, and there are views all over the country on what the right answers are. And I think I am in the hot seat; I would invite you to sit in it.

Mr. LAMALFA. Oh, OK we will heat it up. I yield back, Mr. Chairman.

Mr. YOUNG. I thank the gentleman. And, you know, one of the things that I am hearing here, I am hoping that the revised rule will meet a lot of the criticisms that have been made by the witnesses. We do have another responsibility. Like Mr. Mitchell said, what has been done, is it illegal?

So, we may write a bill. Now, I don't think the Secretary has authority to do this, but if we pass it and it gets through the Senate, which—I think it would be very possible—will the Administration sign it? That is a real question. So I want you to think.

Ms. Esty, you are up. Welcome to the committee for a short period of time.

Ms. ESTY. Thank you very much, Mr. Chairman. I want to thank you and Ranking Member Ruiz for calling this important hearing, and allowing me to join you and participate, as it is very important to my state and to my district.

I also want to thank my friend, now departed, the senior Senator from Connecticut, Richard Blumenthal, who is, as you know, a long-time, passionate advocate for American families, Connecticut families, and is well versed in the issues we are addressing here today.

I would also like to thank Secretary Washburn and the whole team who came, all of our witnesses today. These are difficult and challenging issues, and I trust all of us, and believe all of us are attempting to do the right thing and proceed forward in fairness for native peoples and all Americans in this.

Last month, as you have already heard, I joined Chairman Young, Chairman Bishop, Congressman Mike Thompson, and Congressman Joe Courtney, in writing a letter to the Department

of the Interior, and we asked the Department to refrain from issuing final rules until we have an opportunity to have full oversight. That is why I and, I suspect, others of us here today are distressed that those rules were sent over yesterday, prior to this hearing. But I am grateful that we have the opportunity today to flesh out some of these issues and to air our concerns about the implications, intended and unintended, of the proposed changes.

While I understand there is a desire to improve the current tribal recognition process, I have very serious concerns about the rules as proposed, as we have seen—understanding we have not seen what was sent over yesterday.

I have heard from folks in the town of Kent, that is in my district, that allowing a previously denied tribe, as we have, a second bite of the apple would be tremendously disruptive, economic and quality of life implications that are really profound for one of a number of communities across this country.

And I think we are all in agreement here, certainly on the dais, about the need for fairness. But fairness includes predictability and reliability. And I think it is those risks being undermined if, as in the case of the tribes we are looking at, previously fully adjudicated tribes have an opportunity to re-litigate. And that unpredictability is extremely costly, and poses psychic impacts on the communities they would have to go—as well as major economic impact to re-litigate.

So, we, as a Congress, have a responsibility to conduct a thorough and fair oversight so we can fully understand those implications. And I share the Chairman's and my colleagues' hopes that the final rules address the concerns we have raised here today.

So, Secretary Washburn, a quick question for you. The proposed revisions that we saw most recently to the tribal recognition process allow for tribes that have previously received negative final determinations to re-petition. We know well that the Federal recognition process can be time-consuming and expensive. How can we be sure that the process will be fair for tribes seeking Federal recognition in the future, if the recognition process is now allowed to be opened up to tribes that have been denied in the past?

Mr. WASHBURN. So the question is how is it fair to tribes in the future if it is reopened to petitioning groups in the future, if it is reopened to tribes in the past. Help me understand your concern. Is it that we have people that are waiting in line to be considered, and if we let the past people who have failed the process come back in, that the people that are already waiting in line would have to wait longer? Is that it?

Ms. ESTY. It is also the predictability issue. You are saying now, if we change the criteria—as I understand your answer just moments ago, was if the criteria changed, fairness dictates that we allow tribes to reapply under the new criteria. There is, you know, sort of a res judicata question of at what point does this process end? When will we get finality? How can we have assurance that the new and improved process isn't again going to be asked, "Let's change it again, let's change the criteria"? And that prolongs the uncertainty, makes it extremely difficult for communities, and for tribes themselves.

So, that is the question of what kind of finality do we have if we are changing criteria.

Mr. WASHBURN. Well, fair enough, and that is a concern that we have heard. I know that everyone wants us to be finished with this process eventually that any group that deserves to be recognized gets its hearing, in essence, and then we make a decision, and then we move on. And I don't know when that day will come. We have a hard-working staff at the Department of the Interior that is pedaling as fast as they can to get through these petitions, and we are trying to make it easier on them, to make the process somewhat more efficient.

But I think we all share the interest in finality that we can get to the end of that list, eventually. Thank you.

Mr. YOUNG. I thank the young lady. If you wish to stay, you can. And maybe we will have a second round, if you wish to do so. As I have offered to Mr. Courtney and yourself, your interest in this is deeply appreciated. If you see something that is a little bit questionable, bring it to our attention.

Ms. ESTY. Thank you very much.

Mr. YOUNG. OK. Mr. Gosar, you are next.

Dr. GOSAR. Thank you, Mr. Chairman.

Assistant Secretary Washburn, good to see you again. Sorry the Cats didn't beat the Badgers again.

Now, I am going to go back to the numbers of conversations you just brought up. You testified that there were 3,000 comments, and more than 300 unique comment submissions on this proposed rule. Right?

Mr. WASHBURN. Yes. Yes, that is right.

Dr. GOSAR. So were there more comments in favor or in opposition to the rule?

Mr. WASHBURN. You know, it is hard to say, because they were very substantive comments and they didn't say, "We are in favor," or opposed, necessarily. I would say the vast majority of them favored reform in some way, but they would say, "But we don't like this part of what you suggested," or, "We don't like that part." Some of them said, "In fact, we have another way we would rather you did it."

So, I think the majority of people were interested in reform of the rules, just like we have heard from Congress for the past 20 years.

Dr. GOSAR. Got you. So, of the 300 or so petitions the BIA has on file that indicate at least an intent to eventually file for recognition, how many new tribes do you expect to become federally recognized over the next 10 years, as a result of the relaxed requirements put forth in your proposed rule?

Mr. WASHBURN. I think that number is high that you quoted, Mr. Gosar, Dr. Gosar. But——

Dr. GOSAR. There were 300 unique submissions.

Mr. WASHBURN. That is comments on our rule. Those aren't petitioners. I am sorry, maybe I just misheard you. So, I——

Dr. GOSAR. So what you have is an inventory that you currently have under your purview. How many do you think will, based upon these new rules in the next 10 years?

Mr. WASHBURN. Oh, we hope that the process becomes a little bit faster than it has been. We would like to say it was a lot faster.

And one of the things that our proposal does, and I think the final rule will do, is increase the speed of disapprovals, for example. There are seven criteria, and they are difficult criteria, some of them. So, we have suggested changes that would allow a disapproval if someone clearly doesn't meet one of the criteria.

Dr. GOSAR. I can understand that. But have you done an analysis of the effects of this?

Mr. WASHBURN. Well, we have. It is hard to know exactly what the effects are. We have been doing this process for 35 years, and we have denied 34 petitions and recognized 17, which is one every 2 years has been recognized, basically. But, one every year has been denied, in essence, on average.

So, we hope that it goes a little faster than that, going forward. But our changes, I think, will be incremental, rather than dramatic.

Dr. GOSAR. So, in your opinion, in establishing a protocol, what is your essential element of formulating a decision or a process? I thought I heard time.

Mr. WASHBURN. I would say legitimacy and integrity. Time—it is a very bureaucratic process. And, we have people with graduate degrees doing very difficult, painstakingly detailed work.

Dr. GOSAR. I am glad you said that, because if we are reopening the criteria, don't you think that body—I mean the gentleman over here, Mr. Mitchell, made a pretty serious allegation of the plenary power of Congress, and that you really don't have that jurisdiction. So if you are changing the criteria, don't you think you ought to come to us first?

Mr. WASHBURN. Well, this body has consented to this work for over 35 years.

Dr. GOSAR. How do you justify that?

Mr. WASHBURN. Well——

Dr. GOSAR. Because, I mean, I keep hearing this, but I fundamentally need to see that, Assistant Secretary. And that is one of the things I would like to ask of you, is please delineate for me that decision, that process, and why Congress or where Congress actually gave you that statutory application.

And number two is whether they also fund you for that aspect. Because it has to satisfy twice from that standpoint to meet the anti-deficiency clause in that regard.

Mr. WASHBURN. Well, we certainly have been provided funding, year in and year out, from the appropriations—well, from Congress.

Dr. GOSAR. That specifically said for this reason?

Mr. WASHBURN. Absolutely. And, in fact, you increased funding——

Dr. GOSAR. Well——

Mr. WASHBURN [continuing]. Within the past 10 years, because we weren't moving fast enough. So you gave us more money to hire more historians and more anthropologists and more genealogists. So you have increased funding for the acknowledgment process.

Dr. GOSAR. But I think—I guess my point is changing back to where you are looking at the criteria here, it changes the whole dynamics here. You just don't have free reign to change those criteria. That criteria needs to come back—if you change that criteria, you

have to come back here, because that is not given to you, statutorily. So it changes the whole ball game. That is what the Chairman was trying to allude. And I think that is what the attorney over here, Mr. Mitchell, was trying to do.

But I would like you to—as—you know, I know the Chairman—I just want to finish this last thought.

Mr. YOUNG. OK.

Dr. GOSAR. I want to have you provide to this committee the outline of where in statute, what in statute gives you the detail to go forward on this application. And I thank you.

Mr. YOUNG. I will tell the gentleman I don't believe the Secretary is quite correct about—there is no line item, I believe, in the budget for the program. It goes to the Secretary, and then they disperse the money for this recognition process. But it is not a line item from the Congress.

Mrs. Torres.

Mrs. TORRES. Thank you, Mr. Chairman. And this question is for Assistant Secretary Washburn.

Among the 81 pending applications for recognition listed on the Office of Federal Acknowledgments Web site, there are still a number of applications that have been pending for a very prolonged period of time, 20-plus years. Can you expand on the impact the new rules would have on these types of longstanding applications? And what ability does local government and tribes have under the proposed rules to provide the Department with meaningful feedback during this application process?

Mr. WASHBURN. Yes, Madam Torres, thank you. Let me just say this. We do have a number of listed applicants, in essence, on our Web site. Some of those applicants we don't even have a good address for. They sent us a letter of intent many years ago, said, "We are interested in applying." And that is a problem, because no doubt some community somewhere got spun up about that, got upset about that, when they learned that there might be an Indian tribe within their midst, and we have never heard from them since.

So, one of the changes that we have proposed in our rule is not to count that as an application, if they have just sent us one letter and we have never heard from them again. So we now will consider—under the proposal, at any rate, we will consider a petition only when they have submitted a documented petition that contains information under each of the seven criteria. We won't take them seriously until they do that. So, ultimately, at the end of this, we won't have 81 on that list. We will have a far fewer number of groups that are serious about trying for acknowledgment.

We do have a fair bit of opportunity for state and local governments to participate in the process, to address your second question. We currently notify the governor and the attorney general in the state, and invite comments from local governments as well. And that would stay the same. The only difference is, under our proposal, we will make that information a lot more transparent by putting it up on a Web site, and we will allow people to register if they want to be informed, and we will let them know when there has been information—when there has been a petition submitted, and when we receive that. So, we are working to make the process much more transparent.

Mrs. TORRES. So what process—help me understand the process that you will follow regarding these one-pager applications that you no longer have a current—a good address. Will you have an outreach effort? Will you have a public effort, where somebody could look at a Web site or somebody can hear a PSA and find out that their application will no longer be taken seriously?

Mr. WASHBURN. Well, we have always been willing to provide technical assistance. But what we got early on, frankly, were a lot of people, a lot of groups, writing us saying, "We want to be considered," and then we never heard from them again. And they just never bothered to document their petition. And it is hard to take that seriously, because they just haven't given us any information to go on and, very likely, because they don't have that information.

So, we want that to be clear. We don't want to have the world anticipating an application from someone who really doesn't have the goods, who doesn't have the evidence to back up that application.

Mrs. TORRES. Thank you, and I yield back my time.

Mr. YOUNG. Colonel Cook, the Marines will report for duty, sir.

Mr. COOK. I am here.

[Laughter.]

Mr. COOK. Thank you, Mr. Chair. You know, I have been listening to all this, and I am thinking, God, 50 years ago, if these rules were in place, I might have decided to try to become a lawyer, with all the money that will be made available with all these lawsuits, than going into the Marine Corps. No, I am only kidding. I will always go into the Marine Corps first, before.

Chairman Martin, I want to review the bidding a little bit on the process. But my problem is we have a lot of tribes in my area in southern California. By changing this, of course, there is going to be more litigation now, more lawyers, all these battles, and everything else. And, of course, one of the things that might not be addressed right now is casino shopping.

And there is a certain city—sorry—in—there is no one here in Nevada, I guess—in Nevada that probably has a relationship with a tribe that might have a very, very shaky claim on an aboriginal area that just so happens to be located on a freeway on the way to Las Vegas. And for certain reasons, they would fund or be in partnership with that tribe that has very—at least none that I have found in the past, and you know which one I am talking about. And do you think this will encourage some of these folks to—this interpretation, new process—to go out, find some members that claim they are part of this tribe, and—because we have a great relationship in California with the tribes.

I am a strong, strong supporter, not because of the casinos, but because of some of the injustices that have been done for years. This is money that could be going to schools, to things that the tribe does on the reservation. And this really, really bothers me, changing this whole process. And I want to get your take.

The Chairman talked about another bite to the apple, you heard a lot of this. And if you can just give me your feelings on this, because——

Mr. MARTIN. Well, thank you, Congressman. I definitely think that it opens it up for what we call reservation shopping. We have

been up front, vocal, all along for several years now on reservation shopping, whenever it happens in our area, or in another area in California, we have been opposed to that.

And I do believe this could cause the opportunity for more of that to happen when a small tribe that is isolated out, for no fault of their own, but they are not in a business area that would allow them to have revenue from a casino, gets an opportunity to go into the convergence of two highways on a very large city, and gets promised a lot of money, sure, they are going to try and do everything they can. They are going to try and prove a nexus to that area.

But we are opposed to that. I see lawsuits, a huge cost. I think if, and I think the Secretary alluded to this, that of the seven criteria, if these tribes or these tribal groups are coming and they can't get past, let's say, number two, or number one, then you stop it there. Don't let them come back for 20 years. That has to be a huge cost to the government in expert witness time and lawyers time. And I wouldn't keep allowing that to happen. I just see that as a huge problem that they have.

And, yes, I do definitely feel that that is going to cause more problems than we have today.

Mr. COOK. I appreciate you answering that. I yield back.

Mr. MARTIN. Thank you.

Mr. YOUNG. Mr. Mitchell, you testified contrary to the BIA's position in 1932 and 1834 when it enacted Section 2 and 9 of Title 25, that Congress did not intend these statutes to delegate the Secretary of the Interior authority to create new, federally recognized tribes. But in the *James* v. *Department of Health and Human Service*, the decision of the U.S. Court of Appeals for the District of Columbia Circuit issued in 1987, didn't that court say that Congress did intend Section 2 and 9 of Title 25 to delegate the Secretary that authority?

Mr. MITCHELL. Mr. Chairman, the answer to that question is yes, but no.

Mr. YOUNG. Want to run for office?

[Laughter.]

Mr. MITCHELL. The District of Columbia Circuit in the *James* case—generally speaking, every time someone like me says what I just testified in front of the committee, what people then say is, "Oh, but wait a minute. This has all been settled, because the *James* decision from the D.C. Circuit says that these statutes from the 1840s did, in fact, convey the authority."

There is a problem with that, and that is that, while, if you read that decision, there is language that says that, yes, there is—the Secretary has these 1978 regulations and Congress gave them the authority to do all that in those 1840 statutes. The problem with that is that if you read the decision, you will find that the plaintiffs never challenged the validity of the 1978 regulations. The court just said that in passing on its way to dealing with completely unrelated issues that were in the case. That is what I would hope Assistant Secretary Washburn would agree with me is called in our business dictum, which means it doesn't mean anything, legally. It is interesting, but it doesn't mean anything.

In addition, the world being an oddly small place, if you read that decision you will see that the lawyers who represented the Jameses, the faction of this unrecognized tribe that was the plaintiff, that the lawyers were a father and son team named William and Robert Hahn out of Boston. Through total serendipity, Bill Hahn is a social acquaintance of mine. And when I realized that he had been the counsel for the plaintiffs in this case, because of why it is always thrown out and misstated, in terms of its legal precedent, I called Bill. And he told me what I just told you, which is, "No, we never challenged the validity of the Secretary's regulations. None of that was ever briefed. And the complaint in that case, and all the briefing is out in a cardboard box in my garage in Boston. If anybody would like me to go get it and send it down to the committee, tell them I would be happy to go and find it."

So, the point being is that your question is a good one, because that comes up all the time. But, as I said, the answer is that that case actually does not hold what some of the language in it says.

Mr. YOUNG. OK. Second, Don, the Assistant Secretary of the Interior for Indian Affairs has granted since 1978 petitions that have created 17 new federally recognized tribes. If you are correct that the Assistant Secretary had no authority to do that, what would you recommend this committee do?

Mr. MITCHELL. Well, I think there are two things. First of all, you shouldn't believe for a moment anything I have told you. And what you——

Mr. YOUNG. That is an honest lawyer, I can tell you that right now.

[Laughter.]

Mr. MITCHELL. No, no. But what you ought to do is you ought to go find someone who does not have a dog in the fight, like the solicitor at the Department of the Interior, somebody who is knowledgeable and does not have a dog in the fight, to take a look at what I did, in fact, testify to, and to give you some advice as to whether or not my position regarding that separation of powers issue is legally correct.

Now, for example, the General Accounting Office would be a good place to ask. The Library of Congress provides that service to Congress. You could ask them. There is a constitutional subcommittee of the House Judiciary Committee. I have never been over to that committee, but I would assume that they have, on staff, lawyers who are experts in the Constitution, but who do not know an Indian tribe from a piece of sheetrock. So they could tell you whether the legal theory I have told you is correct, without—it doesn't make any difference whether it is Indians or anything else. And I think that you should get that advice. And I am prepared to predict that that advice will be what I have told you, but you should get that advice from those people.

Now, second, what is going to happen here is that, if I am correct, you have 17 groups that believe that they are Indian tribes, several of which have either already built multi-hundred-million-dollar casinos, and at least one, the Cowlitz Indian Tribe in Washington, certainly aspires to build a casino. And, eventually, some bright lawyer is going to figure out what I figured out. And, if, in fact, those groups are not federally recognized tribes because

the people that recognize them didn't have the authority, then those groups also are not "Indian tribes" within the definition of that term in the Indian Gaming Regulatory Act. And, boy, is that going to be fun to watch.

And the other way it may happen is that one of the legal attributes of tribal status is that a real federally recognized tribe has sovereign immunity. Sovereign immunity is asserted all the time by Indian tribes to try and screw—and there is no other word for it—people who, if they had been victimized by the Federal Government or the state government, would have a remedy in court.

Well, one of these days, one of these 17 tribes, in maybe a slip and fall case where somebody slips in their casino and breaks their neck, one of them is going to get in one of those lawsuits and they are going to assert sovereign immunity, and the attorney representing the plaintiff is going to say, "Really? Well, you have sovereign immunity if you are a federally recognized tribe. How, exactly, did you get to be a federally recognized tribe?"

"Well, the Bureau of Indian Affairs told us that we were."

"Really? Where did the Bureau of Indian Affairs get that legal authority?" And that is going to be fun to watch.

Mr. YOUNG. Thank you. And I just read in the paper the other day that there is a shortage of lawyers. I don't believe it.

[Laughter.]

Mr. YOUNG. But thanks for the comment. And I would suggest, and I am not saying this, if you want to read something quite interesting, read his testimony. It is different. I can tell you that, right now.

And who am I recognizing?

Mr. MITCHELL. Mr. Chairman?

Mr. YOUNG. Yes?

Mr. MITCHELL. Just one last comment on that point. What I did try and do in that testimony, staying barely within the committee's page limit, was to give you at least my view of the history of the whole tribal recognition process, starting from 1834 up through, as I said, 1978. And in terms of context, at least, that is my best shot in a compact period of time. It is obviously not a Law Review article or a book. But if you want more historical context on this very important issue, I would commend my own writing to you.

Mr. YOUNG. OK. Who hasn't—the Chairman, he asked a question. You want to ask some more? Oh, you have another question, that is right, don't you? That is good. Would you like to ask it?

Mr. BISHOP. Yes, let me just ask one final one here.

First of all, let me thank all of you for being here. You have come at great expense, and great time, and inconvenience. I do appreciate it—I think your voices have been at least recognized by us, and have been very, very similar in what is going on. I just have one last technical question for Mr. Washburn, if I could.

Is this proposed rule considered a significant or major rule, under the Congressional Review Act?

Mr. WASHBURN. Chairman Bishop, it is considered significant under Executive Order 12866, and that is why it is over at the OIRA office within OMB. I have not analyzed the question that you

are asking, but we would be happy to look at that, and get back to you.

Mr. BISHOP. Does Mr. Mitchell have an answer on that?

Mr. MITCHELL. Mr. Chairman, I have not looked at that issue.

Mr. BISHOP. Thank you. Yield back.

Mr. YOUNG. I thank the Chairman of the Full Committee. I now recognize the Minority leader.

Dr. RUIZ. Yes, Mr. Chairman, I ask unanimous consent that the letter dated April 21, 2015 from the Regional Plan Association be entered in the record on behalf of the gentleman from New York, Mr. Jeffries.

And I also ask unanimous consent that the statement of the gentleman from California, Mr. Thompson, be included in the record.

[No response.]

Mr. YOUNG. Without objection, so ordered.

Dr. RUIZ. Thank you.

Mr. YOUNG. Any other questions that you would like to ask?

[No response.]

Mr. YOUNG. The Members—well, make it short, because—the Hawk and Dove is waiting for me. Go ahead.

[Laughter.]

Ms. ESTY. Thank you, Mr. Chairman. Just two quick questions for Secretary Washburn that are very specific to Connecticut.

The first has to do with the controlling effect of mere existence of a state reservation. As far as I know, I think Connecticut is the only state with that. And we have had a full adjudication. The IBIA and the Department rejected the use of Connecticut State designation as tantamount to Federal recognition. So that is first.

And the other, can you clarify? There seems some ambiguity about whether splinter groups of tribes that have previously been denied, whether they would have the opportunity to apply. It seems clear that splinter groups of currently acknowledged ones would not, but it is ambiguous, as far as that rule.

Those are the two quick questions, please.

Mr. WASHBURN. Thank you, Madam Esty. We believe that the existence of a state reservation or state recognition is certainly relevant in some respects, and we have been wrestling with what do we do with that, because, frankly, the states have different ways of arriving at recognition, or a reservation. And so we have been wrestling with that.

Splinter groups, our current rule takes efforts not to recognize splinter groups, or not to create an avenue for splinter groups to get independent recognition. And that is important to us. We don't intend to change that at all.

And let me just add. I have heard some really troubling things at this hearing, and I want you to know that the Administration strongly believes that the 17 groups that it has recognized as Indian tribes are, indeed, legitimate Indian tribes. And we treat them just like any other Indian tribe.

I also would point out that the Constitution just says "Indian tribes." It doesn't name any Indian tribes. And so the question, then, is, "Who is that?" And the executive branch has a responsibility to figure that out sometimes, because we have a trust respon-

sibility to Indian tribes. And so, it is very important for us to exercise that.

And even before 1978, before this process, we recognized Indian tribes that maybe didn't have a treaty. So, if you are saying that those tribes are illegitimate, the Administration would strongly disagree with that, because there are tribes that don't have treaties that are, nevertheless, legitimate Indian tribes in the United States.

Mr. YOUNG. Only one comment, Kevin, that the Administration does not have the trust authority with Indian tribes. It is the Congress, only the Congress, not the Administration.

And I want to stress that within this Congress we have the authority to do as we should, as a trust relationship with the Indian tribes. That is the law.

And with that, I want to thank the Members and the witnesses, and the committee is adjourned.

[Whereupon, at 6:38 p.m., the subcommittee was adjourned.]

[ADDITIONAL MATERIALS SUBMITTED FOR THE RECORD]

PREPARED STATEMENT OF THE HONORABLE JOE COURTNEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Chairman Young and Ranking Member Ruiz, thank you for the opportunity to participate in today's hearing on the proposed regulatory changes to the Bureau of Indian Affairs (BIA) tribal recognition process. As you know, on March 26, 2015, I joined a number of my colleagues requesting that your subcommittee conduct such a hearing due to the serious consequences that clearly will occur if the proposed rule change by BIA is actually made law.

As the Congressman for eastern Connecticut, which has experienced impact that tribal recognition can result in, I speak for the vast majority of my constituents in warning that any change in law must be handled with care. We are the home of two American Indian tribes that were lawfully federally recognized in the 1980s and 1990s and also the home of two tribal applicants who failed to achieve recognition. The former tribes, the Mohegan and the Mashantucket Pequot, achieved their status through the BIA process (Mohegan) and an Act of Congress (Mashantucket Pequot)—both constitutionally recognized outcomes.

The two tribes that did not succeed in gaining Federal recognition—the Golden Hill Paugussett and the Eastern Pequot—pursued their application administratively over a long period of years. One of the tribes, the Eastern Pequot, went all the way to Federal District Court after exhausting their administrative appeals.

It was our experience that there *is* a need for change—for example, more transparency, local participation, and a more expeditious process are warranted.

Some of those goals are addressed in the BIA's proposed rule change. Unfortunately, the BIA goes far beyond merely changing process—it also changes *substantive* law by radically rewriting criteria for recognition, and by allowing applications that have already been adjudicated to potentially start all over again, with new criteria. Such a rewrite of the rules violate well established legal principles that protect the finality of judgments which *all* Americans have an interest in upholding. I believe the changes in criteria do not belong in an administrative rule change. Such a change in substantive law is the province of the Congress in which the constitution vests the role of tribal recognition.

I look forward to seeing the testimony and committee record that today's hearing generates. I submit for the record letters and comments from local communities that have been part of eastern Connecticut's recent history with the BIA.

Thank you for this opportunity.

PREPARED STATEMENT OF THE HONORABLE MIKE THOMPSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Thank you Chairman Young and Ranking Member Ruiz for allowing me to enter my statement for the record. A hearing at the House Committee on Ways and Means has kept me from being there in person and I welcome the opportunity to submit the views and concerns of my District on this important subject from my Congressional District.

Like the members of this committee, I support tribal recognition and land use for legitimate claims. When congressionally recognized tribes follow established procedures and prove rightful privilege, they should have full rights and responsibilities. We have seen communities and tribes come together in many positive ways throughout the state of California.

Unfortunately, some groups seek to use the courts or petitions to the executive branch to circumvent Congress and gain recognition. In my own District, we've seen one tribe that was congressionally derecognized try to do just this. Fortunately, a U.S. District Court Judge ruled against the Mishewal Wappo tribe in their suit against the Federal Government seeking status restoration. Had the tribe been successful in its suit, land in Napa County would have been placed into Federal trust, exempting it from all local and state regulations.

More than 50 years after the Wappo tribe was congressionally derecognized, an attempt to circumvent Congress and the U.S. Department of Interior by going through the courts rightfully failed. The motivation behind the lawsuit was clear. By the group's own admission, if the lawsuit was successful, it would have attempted to build a casino in Napa or Sonoma Counties. This ruling respects separation of powers, complies with established statute of limitations law, and protects our region's important agricultural lands from Las Vegas-style gambling.

Earlier this year, I was pleased to join my colleagues on this committee in sending a letter to Secretary of Interior Sally Jewel expressing strong concerns with the proposed changes to Part 83. We noted that the Department's proposed rules fail to address many of the issues that have been identified and could create new problems that lead to unintended and unjustifiable outcomes. It is our hope that the Administration will work closely with Congress to draft rules that are consistent with congressional precedent and take into consideration the needs of the rightfully recognized tribes and their surrounding communities.

We all commit to working together to improve the process to review recognition claims. Unfortunately, the proposed rule could unintentionally make it easier for illegitimate claims to be granted and, as a result, give unfair advantage to newly recognized tribes and have negative consequences for our communities for properly recognized tribes.

I stand ready to work with Chairman Young, Ranking Member Ruiz, and the Administration to find a commonsense and bipartisan solution.

STATE OF CONNECTICUT,
OFFICE OF THE ATTORNEY GENERAL,
HARTFORD, CONNECTICUT,
MAY 4, 2015.

Hon. DON YOUNG, *Chairman*,
House Subcommittee on Indian, Insular and Alaska Native Affairs,
1324 Longworth House Office Building,
Washington, DC 20515.

Re: Oversight Hearing on "The Obama Administration's Part 83 Revisions and How They May Allow the Interior Department to Create Tribes, Not Recognize Them"

DEAR CHAIRMAN YOUNG:

On behalf of the State of Connecticut, I request that the attached Comments of the State of Connecticut on the Proposed Rulemaking Revising the Regulations Governing Federal Tribal Acknowledgment in 25 C.F.R. Part 83 be made part of the record for the above-referenced hearing conducted by the House Subcommittee on Indian, Insular and Alaska Native Affairs on April 22, 2015.

As was demonstrated by the testimony at the hearing, in particular from Senator Richard Blumenthal, the proposed changes to the federal tribal acknowledgment regulations are unjustified and threaten serious adverse consequences for

Connecticut. For the first time in the nearly forty-year history of the acknowledgment regulations, the Interior Department is making wholesale, dramatic changes in the substantive requirements for acknowledgment as an Indian tribe. These changes will have the effect of seriously weakening and undermining the core acknowledgment criteria.

Moreover, as applied to previously denied Connecticut petitioners, they would appear to have the effect of reversing prior acknowledgment decisions for reasons that were expressly rejected in those decisions. Rather than improving transparency, predictability and finality, the proposed changes may undo settled and sensible acknowledgement decisions on which the State and others have relied. To reverse those decisions would impose substantial and unjustifiable disruption on local communities and the State of Connecticut as a whole. The changes proposed cannot be justified in the name of reform and expediency and are contrary to the principles that have long governed federal tribal acknowledgement.

The attached Comments, which were submitted to the Department as part of its rulemaking process, detail the numerous serious problems in the Department's flawed approach to changing the acknowledgment regulations.

I thank you for addressing this very serious issue.

Sincerely yours,

GEORGE JEPSEN,
Attorney General.

[Comments are being retained in the Committee's Official Files]

RPA—REGIONAL PLAN ASSOCIATION,
NEW YORK, NY 10003,
APRIL 21, 2015.

Hon. Congressman Hakeem Jeffries
Eighth District of New York
Central Brooklyn District Office
55 Hanson Place, Suite 603
Brooklyn, NY 11217

Dear Congressman Jeffries:

RPA has begun work on a long-range comprehensive plan that will tackle our region's most urgent challenges, including climate change, fiscal uncertainty and economic opportunity. As RPA works to identify challenges and opportunities, we take stock of policies and practices with the potential to significantly affect our communities and quality of life.

I am writing to you as a member of the House Judiciary Committee regarding the proposed changes to Part 83 of title 25 of the Code of Federal Regulations by the Department of Interior. Specifically, the rules changes could potentially make way for more casino development in the tri-state region. This is a questionable form of economic development with substantial negative effects on vulnerable communities and adverse consequences on local planning and land use.

On September 30, 2014, RPA wrote to Assistant Secretary Washburn requesting detailed public impact assessments and hearings on the rules changes, especially as they relate to potential changes to land use planning and economic development in our and other affected communities. The Department of Interior has not to date provided the additional information or held additional public outreach.

We would appreciate if you would inquire about the tribal recognition procedure and the proposed rule changes, which could have profound land use and economic development impacts in affected communities. We have also become aware of concerns raised about long-standing discriminatory practices by on tribe being considered for recognition, which must be taken into account.

Thank you for your attention to this matter.

Sincerely,

ELLIOT G. SANDER,
Chairman.
TOM WRIGHT,
President.

[LIST OF DOCUMENTS SUBMITTED FOR THE RECORD RETAINED IN THE COMMITTEE'S OFFICIAL FILES]

- September 30, 2014—Comments of Connecticut Local Governments on Proposed Revisions to Tribal Acknowledgment and Office of Hearings and Appeals Regulations—RIN 1076–AF18 and RIN 1094–AA54.
- September 30, 2014—Comments of the State of Connecticut to the BIA on the Proposed Rule Making Revising Regulations Governing Federal Tribal Acknowledgment in 25 C.F.R. Part 83.
- April 19, 2015—Statement for the Record submitted by Eastern Pequot Tribal Nation, Chairman Dennis Jenkins, with Comments submitted to the BIA on proposed Federal recognition.
- April 21, 2015—Statement for the Record submitted by Alliance of Colonial Era Tribes, Rev. John Norwood (Nanticoke-Lenape).
- April 22, 2015—Statement for the Record submitted by MA-Chis Lower Creek Indian Tribe of Alabama.
- April 22, 2015—Statement for the Record submitted by Muscogee (Creek) Nation, Principal Chief George Tiger.
- April 22, 2015—Statement for the Record submitted by Piedmont American Indian Association, Lower Eastern Cherokee Nation SC, Chief Gene Norris.
- April 22, 2015—Statement for the Record submitted by Southeast Mvskoke Nation, Inc.
- May 1, 2015—Statement for the Record submitted by County of San Diego—Office of Strategy and Intergovernmental Affairs, Director Geoff Patnoe.
- May 4, 2015—Statement for the Record submitted by Sault Ste. Marie Tribe of Chippewa Indians, Aaron A. Payment.
- May 5, 2015—Statement for the Record submitted by Chairwoman Carolyn Lubenau, Snoqualmie Indian Tribe.
- May 5, 2015—Statement for the Record submitted by city of Hawaiian Gardens, Councilmember Victor Farfan.
- May 5, 2015—Statement for the Record submitted by Jena Band of Choctaw Indians, Tribal Chief B. Cheryl Smith.
- May 6, 2015—Statement for the Record submitted by United South and Eastern Tribes, Inc., Jamestown S'Klallam Tribe, W. Ron Allen, Chairman, Affiliated Tribes of Northwest Indians, California Association of Tribal Governments, Council of Athabascan Tribal Governments, Inter Tribal Association of Arizona, Maniilaq Association, Midwest Alliance of Sovereign Tribes, Native American Rights Fund.
- May 6, 2015—Statement for the Record submitted by Stillaguamish Tribe of Indians, Chairman Shawn Yanity.
- May 6, 2015—Statement for the Record submitted by Schaghticoke Tribal Nation, Chief Richard Velky.

- May 6, 2015—Statement for the Record submitted by the Towns of Ledyard, North Stonington, and Preston, Connecticut.
- May 6, 2015—Statement for the Record submitted by United Houma Nation of Louisiana.
- May 6, 2015—Statement for the Record submitted by Jamestown S'Klallam Tribe, W. Ron Allen, Chairman.
- May 6, 2015—Statement for the Record submitted by Squaxin Island Tribe, Director Ray Peters.
- May 6, 2015—Statement for the Record submitted by Self-Governance Communication and Education Tribal Consortium.
- May 6, 2015—Statement for the Record submitted by Choctaw Nation of Oklahoma.

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